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NOTES.

The Highwayman's Case (*Everet* v. *Williams*).

TRUTH is stranger than fiction. The story of a highwayman filing a Bill in Equity for an account against his partner, which we had always doubted (*ante*, p. 105), is correct after all.

A learned correspondent has sent us an extract from the European Magazine for May, 1787, vol. i. 360, which sets out the Bill and the orders made. As the orders are dated, we have been able to procure a collation of the originals, which we owe to the kindness of Mr. Hubert Hall, of the Record Office.

The Bill was in the Equity side of the Exchequer. John Everet, of the Parish of St. James's, Clerkenwell, and Joseph Williams were the parties. Apparently it was filed before 1725, and it has not been identified; but, as the orders are there, we have no reason to mistrust the copy of the Bill in the European Magazine.

It recites an oral partnership between the defendant and the plaintiff, who was 'skilled in dealing in several sorts of commodities;' and that the parties had 'proceeded jointly in the said dealings with good success on Hounslow Heath, where they dealt with a gentleman for a gold watch;' and that defendant had informed plaintiff that Finchley 'was a good and convenient place to deal in, and that the said commodities were very plenty at Finchley aforesaid,' and that if they were to deal there 'it would be almost all gain to them.' Further recitals show how the parties accordingly 'dealt with several gentlemen for divers watches, rings, swords, canes, hats, cloaks, horses, bridles, saddles, and other things to the value of £200 and upwards;' and how there was a gentleman at Blackheath who had several things of this sort to dispose of, which defendant represented 'might be had for little or no money, in case they could prevail on the said gentleman to part with the said things;' and how, 'after some small discourse with the said gentleman,' the said things were dealt for 'at a very

cheap rate.' The Bill further recites that the parties' joint dealings were carried on at Bagshot, Salisbury, Hampstead, and elsewhere, to the amount of £2000 and upwards; and that the defendant would not come to a fair account with the plaintiff touching and concerning the said partnership. The Bill, which concludes with a prayer for discovery, an account, and general relief, purports to be signed at the foot by counsel, one Jonathan Collins.

We now give the orders of the Court, corrected from the originals:

Exchequer (Orders, vol. 34), Mich. T. 12 Geo. I, 1725 (No. 43), Saturday, October 30, 1725.

Middlesex. Between John Everet, plaintiff, and Joseph Williams, defendant. By English Bill. Upon the motion of Mr. Serjeant Girdler [of Counsel] with the defendant, praying that the Bill filed in this cause might be referred to John Harding, Esq., Deputy Remembrancer of this Court, for scandal and impertinence; and that he may examine into and report the same to this Court with all convenient speed, which is this day ordered by the Court accordingly.

[On Nov. 13 the Bill was dismissed with costs on the plaintiff's application.]

Monday, Nov. 29, 1725. Upon the motion of Mr. Serjeant Girdler[1] of Counsel with the defendant, praying that the report of John Harding, Esq., Deputy Remembrancer of this Court, made in this cause the 24th of November instant, whereby the said Bill is reported both scandalous and impertinent, might be confirmed; when upon reading the said report, and on hearing of Mr. Philip Ward and Mr. Welden of Counsel with the plaintiff; and upon reading the said report and the plaintiff's Bill; it is this day ordered by the Court, that the said report shall be, and is hereby confirmed; and that it be referred back to the said Deputy Remembrancer to tax the defendant his full costs in this cause, and that a messenger or tipstaff of this Court do forthwith go and attach the bodies of Mr. William White and Mr. William Wreathock, and bring them into Court to answer the contempt of this Court. Brompton, *pro deft.*

Wednesday, December 6, 1725. Whereas, by an order of this Court, made the 29th day of November last, the tipstaff was ordered to take into his custody and bring into this Court William White and William Wreathock the plaintiff's solicitors in this cause—reflecting upon the honour and dignity of this Court; and the said William White and William Wreathock being now brought

[1] Girdler was a real serjeant. The Incorporated Law Society's records do not go far enough back to verify the persons named as solicitors.

into Court, this Court upon consideration had of the premises, doth fyne the said William White £50, and the said William Wreathock £50, and commit them to the custody of the Warden of the Fleet until they pay the said fynes: and it is ordered by the Court that Jonathan Collins, Esq., whose hand appears to be set to the said Bill, do pay the defendant such costs as the Deputy shall tax, and the Court declares the indignity to the Court as satisfyed by the said fynes, and the Deputy not to consider the scandal in the taxation. Ayrs, *pro deft.*

It is further stated in the European Magazine that John Everet, the plaintiff, was executed at Tyburn in 1730; Joseph Williams, the defendant, at Maidstone in 1727; and that William Wreathock, one of the solicitors, was in 1735 convicted of robbing Doctor Lancaster, but was reprieved and transported.

Our correspondent refers, for something like a parallel, to the observations of Manwood J. in 1571, in an action on the case on the Statute of Winchester, 13 Eliz. 1, against the men of the Hundred of A, for damages sustained by the plaintiff by highway robbery.

Referring to a similar case within his own knowledge, in which Counsel actually set up a plea prescribing for a right of robbery, Manwood J. says—'When I was a servant to Sir James Hales, one of the Justices of the Common Pleas, one of his servants was robbed at Gadds Hill, within the Hundred of Gravesend, in Kent, and he sued the men of the Hundred upon this Statute, and it seemed hard to the inhabitants there, that they should answer for the robberies done at Gadds Hill, because robberies are there so frequent, that if they should answer for all of them, that they should be utterly undone. And Harris, Serjeant, was of Councill with the inhabitants of Gravesend *and pleaded for them, that time out of mind, &c., felons had used to rob at Gadds Hill, and so prescribed,* and afterwards by award they were charged' (2 Leon. Rep. 12).

The learned reader is invited to note up his 'Lindley on Partnership,' p. 93, 5th ed., accordingly.

An interesting article on the new Italian school of 'Private International Law,' by Mr. M. J. Farrelly (a contributor to this present number), appeared in the April number of the *Juridical Review* (Edinburgh). The exposition suffers somewhat from the inevitable condensation of a review article; but there is quite enough to awaken intelligent curiosity, which is the main point. Mr. Farrelly comments on the unhappy effect of Bentham's and Austin's narrow and pragmatical definitions in divorcing English from Continental legal thought. We are now beginning to learn

that the old common lawyers whom Bentham and Austin flouted were really the better philosophers; while learned Germans, having just discovered Austin's existence, assume that every British publicist must be an Austinian. We dissent from only one sentence of Mr. Farrelly's. He says it is desirable to draw attention to the existence of the Austinian analysis. It appears to us that what we have to do at present, if we are to have any adequate theory of law, is to forget it as soon as possible.

F. P.

The report of the Privy Council *In the matter of a Special Reference from the Bahama Islands*, '93, A. C. 138, has a good deal of general importance. It is not binding on any English Court, but it lays down certain rules as to contempt of Court which are at any rate entitled to respectful consideration. These rules may be thus summed up:

1. A libel on a judge is not a contempt of Court unless it is calculated to obstruct or interfere with the course of justice or the due administration of the law.

2. It is not a contempt of Court for an editor of a newspaper to refuse to give up the name or manuscript of a writer who has published in the newspaper statements which may possibly constitute a contempt of Court.

3. The royal prerogative extends to the remission of sentences for contempt of Court when the sentences *are merely of a punitive character.*

If the words underlined be properly understood the three rules laid down by the Privy Council are reasonable enough, though it is in some respects to be regretted that it should be necessary to lay down any rules as to such a matter as contempt of Court. There are powers—and the right of the judges to commit for contempt is one of them—the effectiveness whereof depends upon their indefinite character, or, in other words, upon the possibility of freely applying them in accordance with circumstances which from time to time arise. The words we have underlined must however be carefully noted. It may be right that the Crown should remit a sentence for contempt when the whole object of the sentence is to punish. It cannot be right that the Crown should be able to remit a sentence for contempt when the object of the sentence is not simple punishment, but the compelling the offender to act in a particular way, e. g. to give evidence lawfully required of him.

Indeed the time is coming when the whole subject of the right to pardon offences will need most careful consideration. The prerogative of the Crown is likely to turn into the caprice of the execu-

tive, and it is certainly arguable that the right to pardon crimes ought to be placed in the hands of some person or body of persons more independent of political influences than the members of a modern Parliamentary Cabinet.

The judgment of Stirling J. in the Missing Word case, *Barclay* v. *Pearson*, '93, 2 Ch. 154, reported in the June Law Reports, is somewhat disappointing. Certain propositions may however be deduced from it.

1. Pearson did an unlawful act in setting up a lottery, but the unlawful act was Pearson's, and did not affect the transaction into which each contributor entered.
2. Each contributor made a wager with every other contributor, betting that the word he sent in was the missing word. Pearson was, as regarded each contributor, nothing more than a shareholder in whose hands were deposited the sums staked to abide the determination of the missing word.
3. The recovery of money deposited with a stakeholder to abide the result of a wager is a matter wholly different from the recovery of money paid to another in furtherance or performance of an unlawful contract. *Kearley* v. *Thompson* (24 Q. B. D. 742) and *Taylor* v. *Bowers* (1 Q. B. D. (C.A.) 300) had no application to the case. The right of the contributor to recover his money from the stakeholder is supported by *Hastelow* v. *Jackson* (8 B. & C. 225) and *Hampden* v. *Walsh* (1 Q. B. D. 189).

But the Gaming Act of 1892 was surely meant to avoid all transactions in which one man was employed by another for the purpose of wagering. It is a pity that the attention of the Court was not directed to the possible application of this Act to the matter in hand.

'Head-notes as she is wrote' are again exemplified in *Maxim Nordenfelt & Co.* v. *Nordenfelt*, '93, 1 Ch. 630, C. A., a most important case on covenants in restraint of trade. The facts and the decision of the C. A. that the covenant 'was under the circumstances reasonable' are set out, and no attempt is made to extract any principle from the judgments. The otiose addition 'Covenants in general and partial restraint of trade discussed' is all that we get. Surely it would not have been very hard for the reporter, having heard the case, and with the assistance of Bowen L.J.'s elaborate judgment, to help the reader a little more. Let us try what we can do with only the means of an ordinary reader.

The old rule against agreements in general restraint of trade is still part of the law, but its application may be modified according to the development of trade in modern times.

A restrictive agreement is not bad for generality if it is reasonably limited as to place, or as to persons dealt with, or as to the manner of carrying on the trade. Limitation in time is not alone a sufficient, as on the other hand it is not a necessary condition of validity.

The rule against generality does not apply to the sale of a goodwill or a trade secret, provided that the restriction is not unreasonable as between the parties, or injurious to the public.

The Court has regard to the conditions and effective area of the business in question in deciding what limits are reasonable.

Temperton v. *Russell*, '93, 1 Q. B. 715, C. A., is a case which must sooner or later receive more elaborate criticism than we can give to it at present. Here we can only say that we have great doubts whether the decision or the reasons given for it (except as to the cause of action arising from the defendant's inducement of persons to break subsisting contracts) can be supported since *Mogul Steamship Co.* v. *Macgregor, Gow & Co.* '92, A. C. 25. Even apart from that case we should not easily be satisfied that 'maliciously conspiring to induce certain persons not to enter into contracts with the plaintiff' (i. e. to persuade them to abstain from doing what they are lawfully free to do or not to do) is a cause of action known to the law. If there were anything beyond lawful persuasion in the means of inducement used, it would be another matter.

Le Lievre v. *Gould*, '93, 1 Q. B. 491, C. A. is another example of the inevitable consequences of *Derry* v. *Peek*, 14 App. Ca. 337. There is nothing to be gained by further discussion of the law as laid down by the House of Lords in that case. We have to take it as settled that there is no general duty to use any care whatever in making statements, in the way of business or otherwise, on which other persons are likely to act. But one cannot help seeing that in point of fact the result of this law is to encourage practices which may easily go to the very verge of fraud.

What is a 'cause'? This is an inquiry which has long perplexed logicians, and will, it may be expected, never cease to perplex the Courts. *Hamlyn* v. *Crown Accidental Insurance Co.*, '93, 1 Q. B. (C.A.) 750, affords an interesting example of the sort of way in which questions as to causation are constantly cropping up. *A* effects

an insurance with the Company under which he is entitled to receive compensation in case he sustains 'any bodily injury caused by violent, accidental, external, and visible means.' *A* stoops down to pick up a marble for a child and thereby dislocates the cartilage of his knee. *A* claims compensation. The Company refuses payment on the ground that the injury is not caused by 'violent, accidental, external, and visible means.' The Court hold that *A* is entitled to recover, and the decision of the Court probably is right, for it is clear that in cases of fair doubt the leaning of the Courts ought to be against the Insurance Company, not of course because it is a Company, but because the Company is the promisor and obtains a consideration for the promise, the terms of which it has itself framed, and if the promise is fairly ambiguous, ought to suffer for an ambiguity which might have been avoided. Still it must be admitted that a casuist might say a good deal in favour of the Accidental Insurance Company. How, for example, can it be said that when a man stoops down and dislocates his knee the means of the injury are violent? In what sense again are the means, or, in other words, the cause, termed 'external'? These inquiries are not very easy to answer. The difficulty however arises not, as laymen are apt to believe, from the innate tendency of lawyers to quibble, but from the difficulty inherent in the nature of things of precisely determining the cause of an accident.

English law, though it never like the Roman accorded creditors the privilege of carving up their debtor, fully recognized till quite recently the debtor's person as forming part of his assets. When as a concession to humanity it abolished imprisonment for debt (as distinguished from dishonesty) it made amends by bringing money within the compass of a *fieri facias*, by allowing attachment of debts, and granting equitable execution. The Bankruptcy Act, 1883, went still further, and authorized an appropriation of part of a bankrupt's prospective pay or salary. Encouraged by this liberality the judgment creditor in *Holmes* v. *Millage* ('93, 1 Q. B. (C. A.) 551) made the novel experiment of trying to get a receiver of the future salary or earnings of his debtor, a newspaper correspondent, but the Court thought it neither 'just nor convenient' to prevent the debtor from earning his living or receiving his earnings. It would be like carving him up again. For as Shylock says: 'You take my life when you do take the means whereby I live.'

If Kekewich J.'s decision in *Hands* v. *Andrews* ('93, 2 Ch. (C.A.) 1) had stood it would have caused a veritable panic among trustees. It may be very proper that a fraudulent trustee should not escape

imprisonment under the Debtors' Act because he becomes a bankrupt, but to treat a trustee who trusts his co-trustee and remits trust money to him as dishonest and fraudulent because he does not look sharply after him is to ignore the well-established distinction between negligence and fraud. Trustees are accustomed to ingratitude, but this 'encouragement' of the gaol is the most unkindest cut of all.

The introduction of the doctrine of constructive notice into the law of negotiable securities which Lord Sheffield's case (13 App. Cas. 333) threatened was happily checked by *London Joint Stock Bank* v. *Simmonds* ('92, A. C. 201). A banker, we now know, may safely take such securities without inquiry, unless he has some ground for suspecting the honesty of the pledgor, and the mere fact that the pledgor is a broker is no ground for suspicion. In Lord Sheffield's case we must take it there was on the facts ground for suspecting the money-dealer's honesty; and so exit Lord Sheffield's case. *Bentinck* v. *London Joint Stock Bank* ('93, 2 Ch. 120), following *London Joint Stock Co.* v. *Simmonds*, affords a further justification of its principle: for when that mystery of the Stock Exchange known as 'contango' or 'continuation' is revealed by expert evidence it proves that the broker is in nine cases out of ten himself the owner of the securities. He buys the stock, or whatever it is, himself, borrowing on deposit from a bank for that purpose, and then resells to his client. A mercantile practice, like this pledging of securities, will generally be found honest because honesty is really, even in the City, the best policy.

What does a Railway Company really get when it takes land under the Lands Clauses Act without the minerals? Some imaginary line like the Equator, it would seem, or other 'airy nothing.' It has been long since settled that it purchases in such a case no right of support for its line. Now it appears the mine owner may go further and not only let down the surface but if the best mode of getting his minerals is by open quarrying, pull up the Company's rails and sleepers, and in fact disintegrate the permanent way (*Ruabon Brick Co.* v. *G. W. Rly.*, '93, 1 Ch. (C. A.) 427). This is an exasperating proceeding and it is not made much less so by the mine owner's glib retort 'Buy the minerals.' Railway Companies must, however, reflect that the mineral sections of the Lands Clauses Act were passed for their benefit. If they had to take the minerals as well as the surface the cost of making the line would be enormously increased, and they must take the burden of their privileges with the benefit.

The 'ejusdem generis' rule of construction is a highly respectable rule; it is also good sense, but it is easily misapplied, and when it is it makes sad havoc with an Act of Parliament, narrowing if not wholly defeating the object of the Act. This was what nearly happened with sec. 17 of the Bills of Sale Act, 1882, exempting from registration debentures issued 'by any loan, discount, or other company.' Here the ejusdem generis rule, if applied as the Court in *Jenkinson* v. *Brandley Mining Co.* (19 Q. B. D. 568) applied it, would entirely have stultified the section: as it would also s. 32 of the Patents Act dealing with threats 'by circulars, advertisements, or otherwise' (*Skinner* v. *Shew*, '93, 1 Ch. (C. A.) 413). It may seem almost superfluous to say, as Bowen L.J. does in this case, that the Court ought to 'construe an Act of Parliament so as to deal with the whole mischief disclosed,' but lawyers live and move in such a labyrinth of technicality that simple finger-posts like these are far from being without their use.

The conservatism of lawyers has minimized the effect of every statutory reform, from the Statute of Uses to the Married Women's Property Acts. Section 33 of the Wills Act, saving from lapse legacies given by a testator to his children, is a good illustration. To a layman the words seem simple enough, but Kindersley V.C. in *Olney* v. *Bates* (3 Drew. 319), reading them through the spectacles of equity tradition, saw in them the old distinction between a gift to a class and a gift to an individual, and once traced, the loyalty which keeps our judges 'falsely true' to erroneous precedent stereotyped the limitation. Needless to say this exclusion of gifts to children as a class greatly narrowed, as Chitty J. observed in *Harvey* v. *Gillow* ('93, 1 Ch. 567), the beneficial operation of the section, and the rule obtains, it now appears, even where the class is a class of one. The deceased child, to take, must be a 'persona designata.' The most that can be said for the rule is that it creates a pitfall, which seems providentially designed for the confusion of holograph testators.

The influence of one human being over another, malign or beneficent, is still full of inscrutable mystery; but it is none the less potent and pervading, and while it is so our common law rules as to undue influence and confidential relationship will continue necessary. Such rules attest the wisdom of a common law which grows out of the experience of life and is not of *a priori* manufacture. Religious roguery is common enough, but what code compiler would ever have thought of providing for a blind hypnotized confidence like that in *Morley* v. *Loughnan* ('93, 1 Ch. 736), which could give

away cheques for thousands with both hands without asking any questions. The cases on this subject of gifts fall into two classes, briefly but very lucidly stated in the admirable judgment of Wright J. in this case, but the abuse of the ascendency arising from so-called confidential relationships is after all only one mode of undue influence.

Fire, water, poisons, filth, explosives have all been brought within the principle of *Rylands* v. *Fletcher* (L. R. 3 H. L. 330), and now there must be added to the 'wild beast' list, electricity (*National Telephone Co.* v. *Baker*, '93, 2 Ch. 186); and rightly, for is not this mysterious current of all dangerous and destructive forces known to science the strongest, swiftest, subtlest? Among other eccentricities it has the property, it seems, when discharged into the ground by a tram company, of paralyzing a neighbouring telephone system and converting the messages into inarticulate murmurs, a fact which has already been discovered in America. This is certainly a grievance, for inaudibility is a distinct defect in a telephone: but it is no use having a grievance if the author of the nuisance is only doing without negligence (as the tram company in this case was) what the Legislature has authorized him to do. In future, however, the Prosperos of science (and the Legislature too) will have to study more closely the vagaries of this Ariel.

In *Driver* v. *Broad*, '93, 1 Q. B. 539, Mr. Justice Mathew holds that a contract for the sale of debentures issued by a company under the Companies Act, 1862, and charging all its property, both present and future, is, where the company is possessed of leaseholds, a contract in respect of an interest in land and within the 4th section of the Statute of Frauds. Such a contract must therefore be in writing. The decision is, we conceive, right, but it is one of those decisions which raise a question that sooner or later must be carefully considered. Is not the time come for either re-drafting or repealing the 4th and the 17th sections of the Statute of Frauds? The purchaser of debentures means to buy shares, and does not mean to buy land, and it is hard upon him that his purchase should be invalid because the shares happen to constitute a charge upon land. If, further, it is necessary that a contract for the sale of shares in one company should be in writing, why should it not be necessary that contracts for the sale of shares in all companies should be in writing? Most lawyers will admit that the famous sections of the Statute of Frauds stand in the position assigned by some statesmen to the House of Lords. It is time they should be ended or mended.

Sandes v. *Wildsmith*, '93, 1 Q. B. 771, is a useful reminder of the constantly forgotten fact that the old rules of pleading, though technical and rigid, did nevertheless often rest on sound principles. The limits, for instance, placed on the joinder of plaintiffs, though they frequently caused inconvenience, nevertheless rested on the perfectly sound idea that *A* and *B* ought not to be allowed to bring jointly in one action independent claims against *X*. R. S. C., O. XVI, r. 1, might indeed verbally be construed so as to remove all limits on the joinder of plaintiffs. In *Sandes* v. *Wildsmith*, however (which should be contrasted with *Gort* v. *Rowney*, 17 Q. B. Div. 625), the Queen's Bench Division have decided that this construction is wrong, and that *A* and *B* cannot join in bringing an action against *X* for slanders, some of which are alleged to be spoken of *A* solely, and some of which are alleged to be spoken of *B* solely. The decision is satisfactory as showing a return on the part of the Courts to the principles as contrasted with the mere technicalities of sound pleading.

Whoever will read *Summers* v. *The Holborn District Board of Works*, '93, 1 Q. B. 612, and *Reg.* v. *Hopkins*, ibid. 621, will come to a conclusion on which we have often insisted, that the least satisfactory portion of English law consists of judicial decisions on the interpretation of statutes. In *Summers* v. *The Holborn District Board of Works* substantial justice is attained by a not very satisfactory assumption that an enactment is impliedly repealed which, had Parliament intended to abrogate it, might just as well, or indeed far better, have been repealed in so many words. In *Reg.* v. *Hopkins* the words of a statute are strictly followed. The Court refuses to imply a repeal, and thereby arrives at the rather grotesque result that an offender may be exposed to a heavier punishment for not paying a pecuniary penalty than for the original offence in respect of which the penalty was incurred. In neither case will a just critic feel himself entitled to blame the decision of the Courts. Still it is impossible not to feel that Parliamentary enactments, as interpreted by the judges, lead to very odd results.

There can be no reasonable doubt that premises occupied by a volunteer corps for the purpose of the service of the corps, which are reasonably necessary for such service, are occupied by servants of the Crown for the purposes of the Crown and are therefore exempt from rates. But though there is no reason to quarrel with the decision in *Pearson* v. *The Assessment Committee of the Holborn Union*, '93, 1 Q. B. 389, there may be very valid reason for questioning whether the whole principle of exempting so called

Crown property from taxation is sound. It belongs to a state of things which now does not exist, and is in fact a curious survival from the time when taxes represented money actually given to the King by his subjects. The exemption is now justified, if at all, on the ground that the taxation of public property is at best useless, for that it is really taking from the State with one hand money which is returned to the State with the other. But this reply is not satisfactory. Exemptions from taxation always introduce an element of uncertainty and of possible unfairness into the incidence of taxation. They also promote useless litigation.

How far has the master of a Board School the right to punish his scholars?

To a cursory reader of *Hunter* v. *Johnson*, 13 Q. B. D. 225, and *Cleary* v. *Booth*, '93, 1 Q. B. 465, the answer to this question may appear to be difficult. For it certainly is at first sight strange that while a master cannot keep a child at school for half an hour over his regular time as a punishment for not learning lessons at home, he can lawfully cut a child over the hands for striking a schoolfellow on the way to school. Yet when the matter is carefully considered the principle governing a schoolmaster's rights is clear enough. He is the agent of the parent. To the master is delegated the right to inflict reasonable personal chastisement on a child. But this delegated authority has reference only to offences committed by the child whilst under the schoolmaster's charge. Now a child is not under the schoolmaster's charge when in his home and under the eye of his parents, but he is under the schoolmaster's charge not only when he is at school, but when he is going to and coming from school. *Cleary* v. *Booth* and *Hunter* v. *Johnson* are in short applications of one and the same principle, namely that a schoolmaster's right to punish his scholars depends on the extent of the authority which it may reasonably be assumed is delegated to the teacher by the child's father; and this in its turn will depend on the extent to which a child is placed under the charge of the master. Hence, for example, the powers and duties of the head of a public school where boys reside may be very different from the powers and duties of a master of a day school.

That a gift by will to a religious society is a gift for religious purposes is what Mr. Puff would call a 'cautious conjecture.' That a gift for religious purposes is a charitable gift in the legal sense is not quite so undeniable an inference. Primâ facie, however, it is (*Re White*, '93, 2 Ch. (C. A.) 41), as being calculated to

promote 'the spiritual welfare of mankind' (*Baker* v. *Sutton*, 1 Keen 224), that is until the contrary be shown, for there are religious societies and religious societies, and a society which consists of persons associated only for the purpose of sanctifying their own souls by prayer and pious contemplation, however laudable, is not charitable, as not tending, directly or indirectly, towards the instruction or edification of the public. Such charity, to use Bacon's metaphor in speaking of marriage, 'will hardly water the ground where it must first fill a pool.'

It will be good hearing for husbands in Scotland that they are not liable for slander uttered by their wives (*Milne* v. *Smith*, 20 Ct. of Sess. 4th Ser. 95). The tongue hath no man tamed, and why an English any more than a Scotch husband should be supposed capable of ruling that 'unruly member' in his wife it is not easy to say. Had Sir Peter Teazle realized his peril he would have railed on scandal mongers in even more set terms. True, in the brave days of old, the parish furnished the 'Gossips Bridle' and the 'Cucking-Stool,' but the revival of these would be attended with considerable difficulties even if they could be brought into play in time to prevent the mischief. The theory of our common law that the wife lives and learns 'in all subjection,' has utterly broken down and is now an anachronism or an ideal. The only rational theory of a husband's responsibility for his wife's delict is, as Lord McLaren says, that he must have authorized it or identified himself with his wife. The Married Women's Property Act, 1882, has made one hesitating step towards such a consummation by providing that the wife may be sued alone for her torts.

Mr. William A. Keener, who has migrated from Harvard to Columbia College, New York, has an instructive article on Quasi-Contract in the May number of the Harvard Law Review. He shows that what we call 'contracts implied in law' are not a species of simple contracts, for they are not really contracts of any kind. As suggested in a Pennsylvania case quoted by Mr. Keener, 'constructive contract' would have been a much better term. The confusion has arisen from the action of Assumpsit being extended, for reasons of practical convenience, to cases where there was in fact no agreement or undertaking at all.

Mr. John Henry Wigmore, who has taught Anglo-American Law in Japan for some years, has edited, or rather is in course of editing, for the Asiatic Society of Japan, a collection of 'Materials for the

study of Private Law in Old Japan,' which will be of great value to comparative students. Five parts have appeared (not in what will ultimately be their consecutive order): all in the course of 1892. Japan seems to have developed a very full system of indigenous commercial law, including summary procedure on negotiable instruments.

The Gresham University Commission has taken a good deal of evidence on legal education and the possibilities of establishing a real Faculty of Law in London. Among the witnesses were some of the judges. We are unable to refer to the evidence, as it is not yet published, although much of it was given last year. Meanwhile the Harvard Law Review remarks that 'on the continent of Europe, and even in some parts of Spanish America, a liberal education is an absolute prerequisite to the beginning of study for the bar.' English-speaking countries stand proudly alone in treating preparation for a learned profession as one of the things best left to rule of thumb. Mr. Bryce's farewell lecture given last month at Oxford contained some profitable hints and warnings on this topic.

Some Notes as well as Book Reviews are unavoidably deferred for want of space.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

THE SURVIVAL OF ARCHAIC COMMUNITIES.

II. The Aston Case.

THE hunter after relics of very ancient times—I speak of those spiritual things that we call 'institutions,' not of material potsherds—is, for reasons that I have tried to give, much less likely to be deceived by the pseudo-archaic when he is at work in the open country than when he is within the walls of a borough. Life has been slower in the village than it has been in the town; changes have been fewer; the piles of débris are neither so numerous nor so variegated; there will be fewer faults in the stratification: nevertheless, even when we are out in the fields it behoves us to be cautious. There is, or there should be, a broad gulf between the 'Here is a funny old custom' of the antiquarian amateur and the 'Here is a survival from the Norman, the Anglo-Saxon, the Celtic, the pre-Celtic, the pre-Aryan, the pre-historic age' of the scientific explorer. Nowadays many things are old, too old to be easily explicable, which none the less are not even mediaeval. Six centuries divide us from the Hundred Rolls, eight from Domesday Book, near thirteen from the laws of Æthelbert, and even the tiller of the soil sometimes—but I am wasting ink in these generalities.

The famous case of the Aston 'village community' deserves a careful discussion, for the interpretation that we put upon it is likely to tinge our conception of large tracts of English history, economic and legal.

The English township of the fourteenth and later centuries, if it be not one of those privileged and be-franchised townships that are called boroughs, is no corporation; the law does not personify it; it cannot hold land; it cannot sue or be sued. But further, it is not a 'jurisdictional community.' By this I mean that it has no court in which its members, or its 'best and most lawful' members, can declare and enforce the common law or the village custom. Nay, the vill is not even a jurisdictional district, though it is a police district: there is no court of any sort or kind of or for the vill as such. Lastly (so far as I can see) the township is not a self-governing community; it has no governing body, it has no assembly. Often, it is true, the vill is also a parish, and during the last of the Middle Ages, as the permanent endowments of the parish churches, tithes and lands are absorbed

by the religious houses, church rates become necessary, and with church rates assemblies of parishioners collected in the vestry of the church and presided over by the parson or churchwardens; but mediaeval law does not confuse the parish with the township; for it the parish is a purely ecclesiastical institution.

Would it were so nowadays! Why are we to be cursed with 'parish councils'? I hasten to say that I am not about to meddle with any burning question of contemporary politics—I know my place—this is but an outbreak of pedantry. And yet perhaps there is something a little better than pedantry in it. Is our legal geography so rational, so simple, that we can afford to throw good words away? Is it necessary, now that the legal relief of the poor is no longer a semi-ecclesiastical matter, that we should ever be distinguishing (with such help as interpretation clauses may give) between the ecclesiastical parish and the civil parish and condemning ourselves to live in two parishes at once. 'Civil parish' is about as good a term as 'lay bishop' or 'civil archdeacon' or 'temporal diocese' would be. Might we not profitably learn a lesson from America; might we not restore the township? This however is ultra-crepidation.

To return to our Middle Ages—it is well known that much that we have denied to the township, we must concede to the manor. It has a court, and that court is not merely a court of justice, it is also a by-law-making and a precept-issuing assembly; the manor, we may say, has certain powers of self-government. True that when we examine it in the thirteenth century, the jurisdictional, legislative and governmental powers which this court has over one class of its 'justiciables'—the freeholders, if any freeholders there be, are exceedingly feeble (upon very slight provocation the freeholder will be off to the king's court, where his individualistic complaints will find favourable audience), while over the other class of its justiciables—the holders in villainage—its powers, which are mighty enough, are regarded by the law as the mere will of the lord; but then it is possible for us to represent this state of things as being pretty modern, as the outcome in part of recent seignorial usurpations and in part of the yet more recent activity of a distinctively royal or national justice. The lord, it may be said, has mastered or even dispossessed the village assembly, but in so doing has been compelled to let slip from all effective control those lucky members of the community who can persuade the king's justices that their tenure is freehold.

I will not here argue either for or against this theory; rather I will point out one of the limits within which it is confined. Where manor and vill are coincident, it will give us what is in

some sort a village assembly. But manor and vill are by no means always coincident. I am not referring to the cases, common in the north of England, in which the manor comprised several vills. These might be accounted for by the supposition that the lord for his convenience had succeeded in fusing several village assemblies into one manorial court. But it might very well happen that the manor would comprise only a part of a village, that the manor would be made up of parts of different villages, that some part of the village would be in no manor at all.

I am not speaking of rarities. If when we take all England as a whole we can treat the coincidence of manor and vill as normal, this we cannot do if we confine our view to certain large districts of England. One of these districts is Cambridgeshire. Of many a Cambridgeshire village we may safely say that never—at all events never since some time remoter than that of the Norman Conquest—has the whole village coincided with a single manor or formed part of a single manor, that never has it had a single lord, save that lord of all lords, the king. The various freeholders who had land in it, including those who had villain tenants and kept courts for them, often traced their titles up to the king by very different routes, and it was a common thing that part of the village territory should belong to one great honour and part to another.

But more; there can I think be very little doubt that in the Cambridgeshire village the arable lands of the various manors and even of the various honours were often intermixed; that the manor like the virgate lay scattered about in the common fields—an acre here and an acre there. So far as I can see on maps made before the modern inclosures, the village, though it may contain three or four manors, will usually have but one expanse of arable land, an expanse unbroken by ditch or hedge, an expanse that is known as 'the field' of that village.

Now these cases seem to me to be cases of critical importance. They seem to put us to our choice between two paths, and, whether we pursue the one or the other we shall come to a conclusion which must govern our whole notion of English village history. Either, despite the provoking silence of our documents, we must find, or if we cannot find, then we must postulate, some organization of the township that is not manorial, some assembly of the township that cannot be explained by feudal principles; or else we must admit that the system of common field husbandry may be carried on from century to century—perhaps for six or seven centuries—though there is no village tribunal, no village assembly, capable of regulating and controlling it.

It is in this context that the famous case of the village of Aston in Oxfordshire should teach us something. What we know of it is gathered partly from a statement, which in 1657 was submitted to two eminent lawyers, Sir Orlando Bridgman and Mr. Jeffrey Palmer, partly from a custumal compiled in 1583[1]. I will briefly set forth the principal facts, as I understand them, premising a few words as to the whereabouts of Aston.

In the county of Oxford lies the hundred of Bampton, which contains some 42,070 acres. It comprises seventeen parishes, one of which is Bampton. The whole parish of Bampton with its hamlets contains 8,750 acres, and is composed of the following parts:—

	ACRES.
Bampton with Weald . . .	4,970
Aston and Cote	1,870
Brighthampton (part of)[2] . .	410
Chimney	620
Shifford	880

Aston with Cote, then, is a hamlet of Bampton; in 1831 it contained 157 inhabited houses, while the whole parish contained 523.

Now in 1657 there were in Aston and Cote 16 hides of arable land, and four yard-lands or virgates were reckoned to the hide, so that there were 64 yard-lands. The size of an arable yard-land varied from 24 to 28¾ acres[3]. The affairs of the owners of these lands were regulated by a body of sixteen persons known as 'the sixteens.' 'The sixteens' was not, I think, an elected body; each hide had a representative in it, and the practice seems to have been that the various persons interested in each particular hide should take it in turns to represent that hide for one year[4]. On the eve of Lady Day all 'the inhabitants' of Aston and Cote met at Aston Cross 'to understand who should serve for the sixteens for that year coming, and to choose other officers for the same year.' These elected officers seem at this time to have been three grass-stewards

[1] See the papers by Benjamin Williams in Archaeologia, vol. xxxiii. p. 269, vol. xxxv. p. 470; the case and opinion printed by Joshua Williams in The Jurist, New Series, vol. xii. pt. 2, p. 103, also Joshua Williams, Rights of Common, p. 86; Giles, History of Bampton; Gomme, Village Community, p. 157.

[2] Part of Brighthampton is in Bampton parish, part in Standlake parish.

[3] Archaeologia, xxxiii. 270–1. It seems evident that a considerable part of the lands with which we have to deal cannot have lain in what now is deemed the hamlet of Aston with Cote, for if, as Mr. Benjamin Williams says, the arable yard-land at Aston contained on an average twenty-seven acres, then the sixty-four yard-lands contained 1,728 acres, but according to modern computation Aston with Cote contains but 1,870 acres, and so hardly any room is left for the meadows and the commons, which we are told were extensive.

[4] 'Sixteen persons, one for every hide, take their turn yearly in the authority of the sixteen:' Case for the opinion of Sir O. Bridgman. But the case goes on to speak of the sixteen as chosen, so this point is not very clear.

and two 'water-haywards'. Before electing them the tenants divided themselves into two parties: the 'hundred tenants' chose one grass-steward and one water-hayward; the 'lord tenants' chose two grass-stewards and one water-hayward. The meaning of these terms 'hundred tenants' and 'lord tenants' will become plainer hereafter; meanwhile let us see what 'the sixteens' had to do. Each yard-land consisted, as we have seen, of some 27 acres of arable land; these acres were intermixed in the common fields in strips of half an acre or less; but besides this, each yard-land comprised or had annexed to it a right of common for twelve rother-beasts or six horses and also for forty sheep. Then also each yard-land carried with it a right to a lot-mead. The meadow was laid out in sixty-four portions, and in every year each yard-land had one of these portions assigned to it. This assignment was effected by a lottery. Each yard-land had a wooden mark belonging to it, bearing some device; the marks were placed in a hat and the owner of the first mark that came out of the hat became entitled to the piece of meadow that was known as 'the first set.' Each owner then went to the meadow and cut in the grass of the portion allotted to him the device proper to his yard-land; he possessed that portion in severalty from the 1st of March to the 3rd of May, and was entitled to the crop of hay. Then also there were certain hams or home-closes of meadow, namely the Bull-ham, the Hayward's-ham, the Worden-ham, the Wonter's-ham, the Grass-Stewards-ham, the Water-haywards-ham, the Homage-ham, the Smith's-ham, the Penny-ham, and the Brander's-ham, &c., which were 'disposed of at the discretion of the sixteens; some to the officers whose names they bear, some to the public use of the town, as for the making of gates, bridges, &c., and some were sold [that is to say, the crops off them were sold] to buy ale for the merry-meeting of the inhabitants.' Then also lying in the common fields were 'several leyes of greensward . . . two years mowed and the other fed' that were disposed of at the discretion of the sixteens.

Thus the function of the sixteens was to supervise the allotment of the lot-meads, and to dispose according to their discretion of the hams and the leyes of greensward. We further find attributed to them a power of making such orders as they should 'conceive beneficial for the inhabitants of Aston and Cote.' They were to hold ordinary meetings three times a year, in Rogation week, in Whitsun week and upon Lammas Eve; but special meetings might be summoned for the redress of grievances, and the sixteens, or a majority of them, might inflict amercements for breaches of their orders; they themselves also might be amerced 'by the stewards and the body of the town,' though the sum exacted was not to exceed

fourpence. From the evidence before us it is impossible to say exactly what limits were conceived to exist to this power of making ordinances and decreeing punishments, but the sixteens do not seem to have aspired to act as a court of law; nor can we tell what authority they claimed over such of the 'inhabitants' of Aston and Cote as had no proprietary interest in any of the sixty-four yard-lands. The custumal of 1593 was signed 'by most of the substantial inhabitants of Aston and Cote'; the number of signatures was but eighteen. On the whole we have little reason for calling this community a governing community; rather it is a proprietary community.

The amount of communalism that is involved in it should neither be understated nor yet overstated. Each holder of a yard-land holds his arable land by a separate title, a title that is in no sense communal. Annexed to his arable land he has a right of pasture; this also he holds by a title that is in no sense communal. Again his title to a lot-mead is communal only in this sense, that the whereabouts for the time being of his 'moveable freehold' or 'moveable copyhold' is determined by a process of casting lots in which he takes part with his fellows. On the other hand 'the sixteens' deal at their discretion with the 'hams' and the 'leyes of greensward.' To judge by the names of the hams, there had at one time been more village officers than there were in the seventeenth century; for instance, there had been a village smith and a village wonter or mole-catcher, and to each of these a ham had been allotted. Even in the seventeenth century there were grass-stewards, who were bound to see that the mounds and fences were in good repair, and who also had to provide four bulls to run on the common pasture, in return for which provision they received eighteenpence for every cow that fed on the common. But whether we suppose the sixteens to have had all along a free power to decide who should occupy and take the profit of these hams, or whether we suppose that each ham had been devoted to the endowment of some communal office, we have in either case a state of things that cannot easily be expressed in the forms of our common law. Who owned these hams?

From the device of placing the ownership of the soil in some obvious lord of a manor we are precluded. This is the most remarkable feature of this remarkable case—the community at Aston was not a manorial community. Of the sixty-four yard-lands, forty belonged to the manor of Aston-Boges, or more correctly Aston-Pugeys, which was then held by a Mr. Horde. Of these forty yard-lands, twelve were in the hands of copyholders, while the others had been let by the lord to tenants for terms of years from

which we may gather that they had formerly been in his own hand. Of the remaining twenty-four yard-lands, nine were parcel of the manor of Shifford—they had formerly been copyhold, but of late had been enfranchised; four more yard-lands belonged to the manor of Bampton-Deanery, while 'about twelve yard-lands' were 'ancient freehold' held by some yet other title or set of titles not fully explained by the documents that are before us. Those members of the community who were tenants of the manor of Aston-Pugeys seem to have been known as 'the lords tenants,' while the others were known as 'the hundred tenants,' probably because though they owed no suit to the manor of Aston-Pugeys, they did owe suit to the court of the hundred of Bampton.

If now we turn to the Hundred Rolls[1] and look for this community, though we shall fail in being able to identify with accuracy all of our sixty-four yard-lands and shall read nothing about the sixteens, we shall see the manor of Aston-Pugeys, or Bampton-Pugeys, which is in the hands of Robert Pugeys, Mr. Horde's predecessor in title[2], the manor of Shifford which is held by the Abbot of Eynsham, and the manor of Bampton-Deanery, or Bampton-Exoniae, which belongs to the Dean and Chapter of Exeter. On the whole it seems that the occupants of the Aston fields are for the more part customary tenants of these three manors: those of the Pugeys manor are called 'servi,' those of the Exeter manor 'villani'; but probably there are among them a few free-holders, some holding of the Abbot of Eynsham, while a very few may hold either immediately of the king, or of William of Valence, who has a manor of Bampton, to which the Pugeys manor is subordinate[3].

Now it has been stated by a learned and careful writer, who seems to have had access to documents not open to the public, that the manors of Aston-Pugeys, Bampton-Deanery, and Shifford were all of them held of this superior manor of Bampton[4]. Were this so, then the curiosity of the phenomenon that is before us would be much diminished. We might then explain the case in the following way—Once upon a time there was a great manor of Bampton which comprised (as great manors sometimes did) various sets of common fields, and therefore various groups of cultivators; one of these groups was the Aston group; the owner of this great manor created various sub-manors by interposing various mesne lords

[1] R. H. ii. 688; and see 703, where the manor of Shifford appears. A correcter transcript is given by Vinogradoff, Villainage, p. 450.

[2] The title is traced in Archaeologia, xxxiii. 270.

[3] It is difficult to discover from the record which of the virgates mentioned in it are in the Aston fields.

[4] Williams, Rights of Common, p. 87. 'The hundred and manor of Bampton, which comprised all those three several manors, was a superior lordship.'

between himself and the cultivators. Let us say, for example, that the king has the manor of Bampton, he gives part of it to Imbert de Pugeys, part to Eynsham Abbey, part to the Dean of Exeter; each of the sub-manors thus created comprises part of the Aston group; the members of that group were then divided between various lords—no one court had a direct control over them all; some organization was necessary for the regulation of the course of agriculture, the definition of pasture rights and the like, and either by some definite treaty the lords created that organization of 'the sixteens' which we see in the seventeenth century, or else they suffered it to grow up as a convenient machinery for preventing the disputes which would arise among their tenants, disputes which being inter-manorial could not have been determined by any manorial court. As to the few freeholding occupants of the Aston lands, if (as seems possible) they did not hold of any of these sub-manors, their presence might none the less be easily accounted for: if at any time after the passing of the statute *Quia Emptores* one of the lords enfranchised a yard-land, that yard-land would no longer be held of him, but would fall out of his manor.

One part of this hypothetical story is true. William the Conqueror had as part of the ancient demesne of the crown a great manor at Bampton (Bentone) worth the very large sum of £82 a year[1]. Out of this Henry III carved the Pugeys manor, by enfeoffing Imbert de Pugeys with thirty librates of land[2]. Then the same king granted the superior manor and the hundred of Bampton to William of Valence[3]. But in the face of such documents as have been accessible to me, it is not proved that either the Abbot of Eynsham's manor of Shifford or the Dean of Exeter's manor of Bampton-Deanery were held of the royal manor of Bampton. It is true that both the Abbot's men and the Dean's men had to attend the court of William of Valence; but then that court was a hundred court. The Abbot of Eynsham claimed the 'villa' of Shifford under a charter of Æthelred the Unready, which confirmed yet earlier grants: but whether that charter comprised all or any of the Aston lands it would now be hard to say[4]. The case of the Exeter manor

[1] D. B. i. 154 b.
[2] P. Q. W. 664.
[3] P. Q. W. 668; Giles, History of Bampton, p. 128.
[4] Kemble, Cod. Dip. No. 714 (iii. p. 339). Shifford was given to the Abbey by Æthelmar, to whom it was given by Leofwin; King Edgar had given it to Brithnoth. See D. B. i. 155, where, for reasons given in Monast. iii. 1, the land appears as held by the Bishop of Lincoln. As Æthelred's book seems to treat the estate at Shifford as lying in a ring fence, as Domesday estimates this estate at but three hides, and as in Edward I's day the Abbot had at least twelve hides at Shifford apart from what he had at Aston, it seems probable that the Aston lands came to him in other ways, and in the Monasticon are notices of several charters giving him lands at 'Estone.' One virgate at Aston he held of Robert Pugeys, another he held in frankalmoigne 'quo warranto nescimus.'

is somewhat clearer—the church of Exeter seems to have claimed it under a gift of Æthelstan[1], and we have a charter whereby William the Conqueror confirming a gift of Edwy gave to the church of Exeter a stretch of land at Bampton, Aston and Chimney[2]. If then we look for a time (I am far from saying we ought to do this) when the sixty-four yard-lands of Aston were all at the disposal of a single man, it is probable that we must go back far behind the Norman Conquest.

Still of course the question arises—Why should we not go back to an extremely remote age? And here it is that the argument from 'survivals' shows its weakness. The case before us may be explained as readily by the hypothesis of an originally servile community which attained an unusual degree of freedom by being partitioned among various lords, as by the hypothesis of an originally free village upon which the manorial system has been clumsily superimposed. Then on the other hand we have no warrant for saying that our sixty-four arable yard-lands had any existence as arable lands even at the date of Domesday Book. We read of Bampton and of Shifford, but it seems very doubtful whether this Aston is mentioned[3]. Is it not possible that the village or hamlet of Aston is of comparatively modern origin, that some time after the Conquest the lords of several neighbouring manors combined to 'assart' a tract of waste land, partitioned it among their manors in such wise that each should have land of every quality—good, bad, indifferent—and for the settlement of their intermanorial affairs instituted an intermanorial congress of tenants or suffered such congress to institute itself? Such suppositions are easily made. Further research may at any moment disprove many of them; but others will grow in their places. The antiquary has always to be learning that an infinite number of meanings may be set on the mystical letters 'A. D. L. L.'

But the lessons that a prudent antiquary may learn from the village of Aston are not unimportant. In the first place we see that a cultivating group, and one which displays some unusually communal traits, may exist without a court capable of deciding disputes as to the titles by which the various members hold their shares. Some little power of imposing pecuniary penalties for breaches of customary rules may be requisite, will at all events be useful; but the power of imposing penalties, which is freely

[1] R. H. ii. 690.

[2] This charter is No. 16 among the Exeter documents reproduced in Part II of the Anglo-Saxon MSS. (Ordnance Facsimiles). The land comprised in it seems to lie within a ring fence. See also D. B. i. 155.

[3] Besides this Aston there are at least three others in Oxfordshire—North Aston, Steeple Aston, and Aston Rowant.

exercised in modern clubs of all sorts and kinds, must be carefully distinguished from a power of issuing execution for penalties, seizing the offender's goods or the like, and it is not said that the Aston 'sixteens' aspired to this latter, this coercive, power. At any rate, over questions concerning title they had no jurisdiction. This being so, what at first sight looks to modern eyes like a very remarkable communalism, becomes less communal when it is examined. Each member holds his arable land, his pasture rights, even his lot-mead by a several title. He does not hold them because he is a member of this 'field-community'; on the contrary, he is a member of this community because he holds them, because he has come to them by inheritance, by purchase, by devise, or by the grant of a manorial lord. Thus we conclude that it is possible for a village community to exist and to go on existing for some centuries, and to exhibit all those peculiar features that we see at Aston, though it is not a jurisdictional community, or at all events has but very few and very slight jurisdictional powers. All this is so, though the acres lie intermixed in the open fields, though this acre is copyhold of one manor, the next acre copyhold of another manor, the next ancient freehold which, so far as any one knows, belongs to no manor at all.

But more, so I think, can be learnt. When we speak of a 'survival' we seem to imply that the phenomenon in question, though now it be rare and curious, has in the past been common; what is abnormal in one age was normal in another. In every particular case however the inference, which is thus shrouded from view by a fashionable term, may be required to make itself explicit and may be put upon its defence. In any particular case our curio—be it potsherd, be it institution—may turn out to have always been a curio, may turn out to have been from first to last as unique a thing as any thing can be in this imitative world. Now to say that so far as one's own reading goes, the Aston case stands alone, would—this I fully admit—be no very grave argument. Besides retorts of a more personal kind, it is open to the answer—and in this I can see some plausibility—that while from the thirteenth century onwards the proceedings of courts of law, even of very petty courts, have been diligently recorded and preserved in large numbers, the proceedings of such a body as the Aston 'sixteens' would not be put into writing, or no great heed would be taken of the books in which they were noted. Reasons again might be given—I am not sure that they would be very good reasons—why these non-manorial village assemblies have left hardly a mark in such cartularies, monastic

annals and Year Books, as have yet been published. But these attempts to shift the burden of the proof backwards and forwards, and to draw inferences from silence, are not likely to compass any very satisfactory conclusion. It seems to me, however, that of the rarity of any institution or arrangement which can in any degree affect men's legal rights, we have one good test. If it be not rare, the law will have an obvious place for it, and will know exactly what to make of it. Of course some arrangement, some mode of conducting business, some class of transactions, may, as it were, stand outside the sphere of law for a considerable time. Its legal consequences remain uncertain, possibly there will even be doubts as to whether it be lawful or unlawful. So far from denying this, I think that just in this context we ought to insist upon it. Litigious as Englishmen are and have been for many centuries past, a great deal will always be going on even in England about which the law, if I may so speak, will have not yet made up its mind; but I think that in such cases if we have not to deal with rarities we have to deal with novelties. I think, for example, that if at the end of the Middle Ages our law, our exceedingly conservative common law, has no obvious place for a certain institution, we must, until the contrary be proved, incline to the conclusion that this institution cannot have been both very ancient and very common.

And now returning to Aston, we will ask once more the question —it is far from being a frivolous question—Who owned these 'hams' and 'leyes of greensward' which 'the sixteens' claimed to dispose of 'at their discretion'? or, to be more technical—Who was seised of them? In whom were the freehold and the fee? Mr. Horde, when he sought Sir Orlando's advice, observed that the sixteens, being no corporation, could have no legal estate in the said hams. Bridgman, one is happy to say it, found an answer—'If the custom be a good custom, as I take it to be, the same custom will give the officers an interest as incident to their offices and [such an interest] may belong to an office, as in the case of the Warden of the Fleet.' The great lawyer has recourse to the notion of official property; the owners of these hams are the sixteens; not the community itself, but the officers of the community; each year the land passes from one set of sixteen co-tenants to another set of sixteen co-tenants, as the tenancy of the Fleet gaol and (so it seems) certain satellitic shops passes from warden to warden. Now this may have been a very happy use of the only category that was at Bridgman's command, the only category by means of which the common law of his day could have done substantial justice to the men of Aston. Still we cannot but feel that its application to the facts in question is an

artifice; an artifice worthy of a great lawyer, it well may be, an artifice that the courts may approve, and which will bring them to a much desired result; but still an artifice. Our 'village community' is saved, because the relation in which its 'archaic moot' stands to its land, is so like the governorship of a gaol.

That Sir Orlando had to fetch his analogy from a remote field seems plain enough; but to this we must add—so I think—that he had to find it in an unfertile field, and in one that had but recently been brought under cultivation. Of course in his day it was undoubted law that 'land may be appurtenant to an office'; but if we look for the cases which illustrated this proposition, we shall, I believe, find very few. There is just one standing illustration of it which does duty in report after report and text-book after text-book—there is land appurtenant to the Wardenship of the Fleet. Now I think that we have grave cause for doubting whether this classical instance was a very old one; but I am more concerned to insist upon its extreme rarity than upon its novelty. Our mediaeval law had little, if any, room for 'official property.' Within the sphere of ecclesiastical arrangements, it had by slow degrees developed the notion of the 'corporation sole.' At first the saint owns the land that has been given to him; in later and more rationalistic times his ownership is transferred to the personified 'church'; and thence in yet later days it is transferred either to a 'corporation aggregate' or to a somewhat analogous creature of the law, which here in England bears the odd title 'corporation sole,' while elsewhere it appears as the personified *dignitas* or *sedes*. But outside the ecclesiastical sphere, there has been no need, little room, for these feats of 'juristic construction.' Even the personification of 'the crown' has been a slow process, and has never gone very far; he who would distinguish between 'the crown' and the king, unless he be very cautious, is likely even in Coke's day to fall into 'a damned and damnable opinion,' is likely in earlier times to lose his head as a traitor. We got on well enough without official property, without 'corporations sole' of a temporal kind. The non-hereditary royal officer, whose office involved an occupation of or a control over land, was seldom, if ever, conceived as being the owner, or to speak more accurately, the freeholder, of that land; he was but its *custos*, and the freehold was in the king. On the other hand, the offices—they were chiefly ornamental offices—which had become hereditary—were but seldom connected in any inseverable fashion with the tenancy of lands, save where the discharge of the office was regarded as the service due from the land, and in that case it was the office that was appurtenant to—or rather that was due from or issuing out of—the land, and not the land that was appurtenant

to the office. I cannot but think that there must have been some highly peculiar and almost unique facts in the case of the Warden of the Fleet, which prevented it from falling into one of these well-known categories. But at any rate the title 'land appurtenant to an office' has, so far as I can see, been from first to last somewhat of a *caput mortuum* in our books; and yet it is under this heading that Sir Orlando Bridgman is constrained to bring the case of the Aston villagers.

Could he have worked out his theory in the thirteenth century? I seriously doubt it. If 'the sixteens' existed in the Aston of that age—and I am not denying that they did—most of them were unfree men. Would it not have been grotesque to attribute to men, who had but precariously customary rights in their arable virgates, the freehold in the accessory hams and leyes? And then is it not law that if my villain acquires a freehold, I may seize it and appropriate it? And what if the sixteen co-owners misconduct themselves and refuse to perform their 'official' duties? Has thirteenth-century law any mode of bringing them to book? Court of Chancery there is none for the enforcement of a trust. The king will hardly be induced to set in motion those prerogative processes of administrative law which can be brought to bear upon royal officers, including the ruling officers of the boroughs. The villagers must trust to pure common law, to the writs that are 'of course,' and I think that in easily conceivable circumstances they will have the greatest difficulty in enforcing their custom against their freeholding 'officers.'

Now the argument that the law of the later Middle Ages had no place, or at all events no obvious and convenient place, for such an arrangement as is discovered at Aston, might, were it tendered as a direct proof that such an arrangement cannot be very ancient, be encountered by the assertion that, on the contrary, the incapacity of the law to explain the phenomena may well be the incapacity of modern law to explain ancient phenomena, may well, in this particular instance, be the incapacity of feudal law to compass facts that belong to a prefeudal age, or (to use another set of terms) the incapacity of individualistic law to compass facts that belong to a communistic age. In the debate that would thus be raised much might be said on the one side and on the other; in particular, were I to enter into the discussion, I should like to raise the question whether it is very probable that these ideas of corporate ownership and official ownership, which we seem to see our English lawyers laboriously constructing in the fourteenth and fifteenth centuries, are in truth very ancient and even primitive ideas which have for a while been submerged and even destroyed

by a flood of feudalism and individualism. But waiving this general question, we may yet learn a valuable lesson from the grave difficulties that our common law finds in the Aston case. Whatever we may think of very remote times, we seem to be driven to the conclusion that for several centuries before Bridgman's day, arrangements similar to those which existed in this Oxfordshire village, had been exceedingly uncommon. The learned conveyancer, the future chief justice and lord keeper, does not tell Mr. Horde that what is seen at Aston may be seen in a hundred other villages, that the ownership of land by 'sixteens' or similar officers is a well-known thing; he does not suggest that the Aston community could make itself a corporation by prescription; he sends his client all the way to the Fleet gaol for an analogy. But during the past centuries the open field system of husbandry had been, and in Bridgman's day it still was, exceedingly common, and this too in many a village which as a whole was not subject to any manorial control.

It seems to me that some of our guides in these matters are in danger of exaggerating the amount of communalism that is necessarily implied in the open field system of husbandry. We have of course the clearest proof that the system can go on subsisting in days when manorial control has become hardly better than a name, that it can subsist even in the eighteenth and nineteenth centuries. We have also, so I think, fairly clear proof that it can subsist from century to century in many a village that has no court, no communal assembly. No communal by-laws and indeed no legal recognition of the communal custom are absolutely necessary for the maintenance of the wonted course of agriculture; the common law of trespass maintains it. As a matter of fact, a man cannot cultivate his own strips without trespassing on the intermixed strips of his neighbours. He must let them trespass on his land at the usual times and seasons, because at the usual times and seasons he will want to trespass on their land. The effect of this may be that his right to till his land as and when he thinks best will be much restricted; but the restraint will be set by the rights of other individuals, not by the rights or the by-laws of a community[1]. In the village which has open fields we may see each of the neighbours owning his arable strips by a several title, enjoying his pasture rights by a several

[1] Report on Commons Enclosure, Parl. Papers, 1844, vol. v, Qn. 4100, 'The horses of one party ploughing, would unavoidably tread down and destroy the crop which was growing on his neighbour's land?' Mr. T. S. Woolley—'Yes; it is almost impossible that land so intermixed should be cultivated with different crops; it becomes an almost necessary consequence that all must sow the same crops, and at the same time; unless all the lands be cultivated by one horse.' This 'almost necessary consequence' is one that is drawn by the common law of trespass.

title. Even if there be lot-meads, each of these 'moveable freeholds' may be held by a several title, and their rotation may be regarded as having been fixed once for all, and as being alterable by nothing short of an unanimous agreement or a statute of the realm. Open field husbandry has shown itself to be not incompatible with a very perfect individualism, a very complete denial that the village community has any proprietary rights whatever or even any legal organization.

This having been so in modern times, this (to all appearance) having been so throughout the later Middle Ages, are we quite certain that it has not been so from the beginning? I do not aspire to answer this question, still I cannot but think that some of our current theories are finding it too simple a question, are failing to notice the ease with which a common field husbandry, when once established by some original allotment of land, can maintain itself even though there be in the case nothing that we dare call a proprietary corporation or a self-governing community.

For my own part I cannot assume, as some in the heat of controversy seem apt to assume, that concerning the ancient history of the typical English village (I say 'typical,' for no one supposes that all our townships have had a similar history), we have just two theories to choose between and no more; that if we cannot accept as the normal starting point 'great property,' widespread servility and the Roman villa, we must begin by ascribing land-ownership to free village communities. The free village, the village which as a whole is free from seignorial control, I can somewhat easily believe in, for—so it seems to me—I can see many such a village in the pages of Domesday Book, many a village full of sokemen, who may fairly be described as free land-owners, though they have been commending themselves, one to this lord, another to that. Whether such a state of things is common or rare, typical or abnormal, a survival or a novelty—these are serious questions; but the village full of free land-owners we can readily conceive. On the other hand the village land-owning corporation, can we conceive this and carry back our concept into—I will not say archaic, I will say—Anglo-Saxon times? Did men distinguish between co-ownership (which in truth is just as 'individualistic' as any several ownership can be) and ownership vested in corporations? Did they distinguish between the corporation and the group of corporators, between the *universitas* and the aggregate of *singuli*? Did the villager feel that when he reaped a crop, or turned out his beasts to pasture, he was exercising not a *dominium* but

a *jus in re aliena*, that he was using land that belonged neither to him, nor yet to him and his neighbours, but to a quite other person, an invisible being, a thought? Did he again distinguish between manifestations of proprietary right and manifestations of governmental power? Was he certain—are we certain—that when the village moot (if any village moot there was) prescribed a particular course of agriculture, it was exercising land-ownership and not merely governing a district, not merely behaving as a modern town council behaves when it decides what buildings may be set up within the limits of the borough? May it not again be that such communalism as we find in the ordinary village of later times is in a large measure the result of seignorial pressure? In fine, is it not very possible that the formula of development should be neither 'from communalism to individualism,' nor yet 'from individualism to communalism,' but 'from the vague to the definite'?—England, owing to its theoretically perfect feudalism, may not be so good a field for the pursuit of these questions as some other countries in which they are being diligently discussed. There is all the more reason why we should expressly raise them and keep them before our minds; otherwise it may fall out that we shall turn history topsy-turvey, and attribute to primitive man many an idea that he could not for the life of him have grasped.

F. W. Maitland.

NOTES.

1. *Township-moot and Vestry.*

So far as I am aware our only authorities for the term 'township-moot' are a very few charters of the Angevin kings, such as Richard's for Wenlock Priory (Eyton, Shropshire, iii. 237), Richard's for Chertsey Abbey (Monasticon, i. 433), and John's for Chertsey Abbey (Rot. Cart. Joh. p. 6), in which the grantees are freed 'ab omnibus schiris et hundredis requirendis, et placitis et querelis, et hustingis et portmanemot et tunsipemot.' This will seem very remarkable when we consider the hundreds and thousands of instances in which the English names of other local assemblies, shire, hundred and halimot, are mentioned. The occurrence of the 'tunsipemot,' in close connexion with the 'hustings' and the 'portmanemot' suggests, so I think, that it was chiefly within the cities and boroughs that an assembly called a 'townshipmoot' was to be found. But I am quite ready to believe that a manorial court sometimes bore this name. Often enough a manorial court was as a matter of fact a court of and for a vill. In Latin it will be called *Curia villae de X*, and, since we know that down to the end of the Middle Ages the word 'moot' was the common English equivalent for 'curia,' it would be somewhat

strange if a manorial court was never called a 'townshipmoot.' But though this be granted, we are still far enough from the proposition that every township as such has a moot, while the leap from the 'townshipmoot' to the vestry seems to me a most perilous feat. After weighing all that has been said to the contrary by that able and zealous pioneer of history, Mr. Toulmin Smith, it still seems to me that the vestry is a pretty modern institution; that we shall hardly trace it beyond the fourteenth century, that it belongs to the parish, a purely ecclesiastical entity, not to the township; that it is the outcome of the church rate, which in its turn is the outcome of the appropriation of tithes and the poverty of the parochial clergy; that the churchwardens also are pretty modern. Gradually the vestry may take upon itself to interfere with many things; the manorial courts are falling into decay, and the assembly which can impose a church rate may easily aspire to impose other rates; but the germ of the vestry is an ecclesiastical germ. The vestry belongs to the parish, and the temporal law of the thirteenth century knows nothing of the parish. If we take up a plea roll of that period we shall find the *villa* mentioned on almost every membrane; of the *parochia* we shall read no word unless we happen to stumble upon a dispute about tithes.

2. *The Warden of the Fleet.*

The Wardenship of the King's House and the Fleet Gaol was a hereditary office which was held in fee. In Edward I's day it was so held by one Ralph of Grendon (Calend. Genealog. i. 294). In Edward IV's day it seems to have been so held by a woman, Elizabeth Venur (Y. B. 4 Edw. IV, f. 6. Pasch. pl. 7). Charles II made a grant of the fee simple; Mr. Huggins, of infamous memory, held it for two lives. I cannot say that never during the Middle Ages was it held at the king's will, but I believe that the well-known dicta about it refer to an office that is usually held in fee simple by one who not unfrequently demises it for lives or for years. I do not know of any very ancient dicta about it; but in the Year Books of Henry VII we come upon the now familiar example more than once. 'Land may be appendant to an office as in the case of the Warden of the Fleet' (1 Hen. VII, f. 29. Trin. pl. 6). This is said in a case which seems to show that the same doctrine had been, and could be applied to some other offices, such as the wardenship of certain royal forests. 'The Wardenship of the Fleet has land annexed to it, and this passes by grant of the office without any livery of seisin of the land' (8 Hen. VII, f. 4. Trin. pl. 1). 'It has often been seen that the Warden of the Fleet has pleaded that he was seised of the office of the Fleet by the king's grant, and that he and all those whose estate he has have used to take a certain sum of money from everyone who had a place in this Hall for the sale of his merchandise' (12 Hen. VII, f. 15. Pasch. pl. 1). I should not be surprised if the shops in Westminster Hall were the main foundation for the whole doctrine. There, under the very eyes of the justices, the warden, his deputy or lessee, was taking rent from the occupants of the stalls. One

had to ascribe to him some sort of interest in those stalls, but this sort had to be an odd sort, for it would have been impossible to hold that he was seised of the soil on which the king's palace was built. He has an official interest in the shops; it is a freehold interest, for he holds his office in fee or for life; and yet he is not seised of the land. There may have been some forest wardens, who were in much the same position, having a right to let land and pocket the rent arising therefrom, though the king was seised of that land; but I do not believe that the case was common. For the more part in our mediaeval law the link between land and office is tenure by serjeanty; a man holds the land by the service of filling the office.

BETTERMENT.

OWING to the attempt of the London County Council to obtain the sanction of Parliament to their proposal for a special kind of taxation in connexion with the Strand Improvement Scheme, the word Betterment has become almost a household word. It has been called a barbarous word, but it is nevertheless a most expressive one, for it conveys at once the idea of a claim for a contribution in consequence of some special advantage. My inquiries into the subject in America have brought me the information that (in New York at least) though the word Betterment is not known the thing is—that is, that although the thing is not called Betterment in New York, it is usual there, and is thought to be right, to make what is called a special assessment for a special benefit.

To understand this, however, it should be remembered, or rather stated, because it is not generally known, that the system of taxation in America varies very considerably from our own. Speaking generally taxation in America is assessed on the capital value of the subjects taxed, and not, as with us, on the annual value, and further the subjects of taxation comprise not merely, as with us, real property such as land and houses, but personal property such as stocks and shares, furniture and the like. This fact, as will be seen later on, furnishes at least one very good reason for the discrimination which is one result of what we may call Betterment taxation or special assessment for special benefit.

An instance of what is meant by Betterment and how it is worked will be of more value than a long disquisition upon it.

It so happens that in New York an improvement somewhat like the proposed Strand Improvement in London has recently been sanctioned, and I am informed that, although it was shown conclusively that the public generally and not the particular locality in which the improvement is to be effected will be benefited by it, two-thirds of the cost are to be thrown on what I may call a betterment area, and only one-third is to be paid by the taxpayers of the city as a whole. I have endeavoured to make out the reason for this, but having seen on the plan of New York the improvement indicated and the betterment area marked out, I have been unable to see why in New York what was shown to

be a benefit to the public generally and not to a particular locality only, should not be wholly paid for by the general public instead of by the inhabitants of a particular locality, any more than I was able to see why the Strand Improvement, which was obviously one for general benefit, should not be paid for by the Metropolis generally, instead of being to a great extent visited, so to speak, upon the owners and occupiers of property within a particular area. But here the fact that in New York personal property is subject to taxation does furnish a reason for some discrimination, and it may be that casting two-thirds of the cost of the New York improvement on the immediate neighbourhood is a rough and ready way of distinguishing between those who certainly will and those who may not benefit directly by an improvement. I confess, however, that I have been unable to explain satisfactorily even to myself why such a peculiar course should be adopted, and why it should not be said that personal property cannot benefit and therefore shall not pay, leaving real property in the locality to pay the lion's share and that at a distance a smaller share of the cost of an improvement. The truth, however, is that the more the subject is considered the more inexplicable does the course actually pursued appear to be.

It may be convenient here to state precisely what the law on this subject is in America, and I am able to quote the language of the statute which governs such matters in New York. It is in fact the New York Local Government Act. Under the heading 'Opening street avenues and public places,' this Act empowers commissioners 'to make a just and equitable estimate and assessment of the loss and damage, if any, over and above the benefit and advantage, or of the benefit and advantage, if any, over and above the loss and damage as the case may be to the respective owners, lessees, parties and persons respectively entitled unto or interested in the lands, tenements, hereditaments and premises *required* for the purpose by and in consequence of opening such public square or place, street, avenue or park, or section of a street or avenue so to be opened, or by or in consequence of laying out or forming such public street or place so to be laid out and formed, or by or in consequence of extending, enlarging or otherwise improving the street or public place so to be extended, enlarged or otherwise improved as the case may be, *and* a just and equitable estimate and assessment also of the value of the benefit and advantage of such said public square or place, street, avenue, or part or section of a street or avenue so to be opened, or such street or public place so to be laid out and formed, or of such extension, enlargement or other improvement of the street or public place so to be extended,

enlarged or otherwise improved as the case may be to the respective owners, lessees, parties and persons respectively entitled unto or interested in the said respective lands, tenements, hereditaments and premises *not required* for the purpose of opening, laying out and forming or extending, enlarging or otherwise improving the same.'

Underneath this mountain of verbiage two principles are to be found.

First, that in dealing with the owners, &c., of property *required* for a public improvement two things are to be ascertained and set one against the other—on the one hand the loss or damage, on the other hand the benefit and advantage—and a money value being put upon each, the balance is to be paid or received by the public authority according as the value of the loss or damage exceeds or is less than the value of the benefit and advantage.

Secondly, that in the case of property *not required* for the improvement a one-sided account only is to be taken—that is, the value of the benefit and advantage is to be ascertained and the amount paid by the owner of the property benefited to the public authority. That is Betterment pure and simple.

It will be seen that no inquiry is directed as to damage (or, to use a word which has been coined to represent the opposite of Betterment—'Worsement') where property is not required for the purposes of an improvement; and yet there seems to be no reason why if one man is to pay for Betterment another should not be compensated for Worsement. For it is clear that what will benefit one owner or occupier will, or at least may, injure another; and if absolute equity is to be sought after, Worsement must accompany Betterment.

Now let us see how this question is dealt with in Australia—the only country, so far as I know, besides America where even an approach to Betterment taxation is known.

The 35th Section of the Lands Compensation Statute 1869 of Victoria is as follows:—

'In estimating the purchase money or compensation to be paid by the Board in any case regard shall be had by the Magistrates, Surveyors, Valuators or Jury as the case may be not only to the value of the Land to be purchased or taken by the Board but also to the damage (if any) to be sustained by the owner of the lands by reason of the severing of the lands taken from other lands of such owner or otherwise injuriously affecting such other lands by the exercise of the powers of this or the special Act, and they shall assess the same according to what they shall find to have been the value of such lands, estate or interest at the time notice was given of such lands being required for the works or the undertaking, and

the said Magistrates, Arbitrators, Surveyors, Valuators and Jury in assessing such compensation are authorized and empowered and shall take into consideration the enhancement in value of the adjoining land belonging to the person to whom compensation is to be made or any other benefit or advantage which such person may or shall obtain by reason of the making of such works or undertaking in reduction of such compensation.'

This section became the subject of judicial decision in the Privy Council in the case of *Harding* v. *The Board of Land & Works* (11 Appeal Cases 208).

The facts in that case were that the commercial or market value of the land taken was found at	£61	1	9
Compensation for compulsory purchase . . .	15	4	0
The value of a fence	113	0	0
	189	5	9
Compensation for severance	60	0	0
Total .	£249	5	9

On the other hand the enhancement in value of adjoining land was £591.

The Privy Council held that the landowner was entitled to the £189 5*s.* 9*d.* and that the £60 for severance was swallowed up in the £591 for enhancement of value, but they declined to set the £591 against the £249 5*s.* 9*d.* and make the landowner pay the difference; and their reasons were stated as follows:—

'Their Lordships have had great difficulty in coming to a conclusion as to what was the intention of the legislature in the latter part of this Section. They cannot agree with the Chief Justice of the Supreme Court when he says that the policy of the last part of the Section is obviously to enable the Government in the construction of Railways or other expensive works to recover by way of set-off to the compensation for lands taken or injuriously affected a deduction for benefits resulting to the Landowner from the formation of the particular work. He does not seem to have considered that there would be lands adjacent to the Railway which would be enhanced in value by the making of it but no part of which might be taken by the Board. The owners of these might be equally benefited with the owners of lands taken, or even more so, and would lose nothing, whilst the latter might lose the whole value of their land that was taken. If this was the intention, it might have been clearly expressed.'

Whether in so construing the Section the Privy Council were giving effect to the intentions of its framers may be doubted, but their observations point out the essential unfairness of setting Betterment against injury in the case of lands being taken for

an improvement unless Betterment can be enforced against adjoining landowners who benefit by an improvement but whose property is not required for the purpose of the improvement. So far the observations of the judges in the Privy Council are in favour of those who now seek to impose Betterment taxation pure and simple—that is, to claim from persons who get a special benefit a contribution in aid of the cost incurred by those who make the improvement.

It may be admitted at once, so far as my personal views are concerned, that, provided some satisfactory way of assessing the value of the Betterment or special benefit can be found, there is nothing unreasonable in the attempt to get a contribution towards cost from those who specially benefit by the expenditure.

But how did the London County Council propose to do this?

They first proposed a Betterment area—that is, an area within which it was to be presumed that a special benefit accrued; but this area was practically abandoned as soon as attacked; and plainly it could not have been justified.

Within that area it was proposed to enact that the Council should assess what they thought was the annual value of the Betterment and charge it on the property benefited, subject to appeal to a standing arbitrator, who should in result find what property was bettered and to what extent and fix a rent-charge accordingly.

Here is the weak point of the proposal—What human being, surveyor or lawyer or compound of both, could be trusted to attempt, much less to perform, such a task?

It is always disagreeable to remark upon professional men who no doubt do their best according to their lights, especially if they be, as they are, friends of the writer's. But in discussing matters of this kind it is necessary to speak plainly, and this ought to be possible without being offensive. Accordingly I wish to refer to a recent case of a claim for worsement. The claim was supported by one of the most eminent surveyors in London, and the amount he demanded for his client was £54,868. The claim was resisted by an equally eminent surveyor, who asserted that the damage was nil. The umpire, another eminent surveyor, awarded the claimant £6000. Now £6000 is much nearer to nothing than it is to £54,868, and the only argument that can be founded upon the case is the one I desire to found upon it, namely, that in cases of pure damage (and I will add cases of pure benefit or Betterment) it (to use a well known phrase) 'passes the wit of man' to put a money value upon something which is not, but is to be, the result of something that is to happen in the future.

That in case Betterment becomes the law of the land, claims will be made under such a law by public authorities who have spent money in public improvements is certain, and equally certain it is that professional witnesses will be found to make and support them (aye and to oppose them too) and quite honestly, but it may be well for those who have to decide whether such a change of the law shall be made to consider whether it is desirable to increase the already too numerous cases in which professional witnesses contradict each other by adding to the cases where property is required cases where there is no claim arising from compulsory purchase of property for public purposes, but a mere speculation of increased value to put into figures.

Let us, however, see how this matter is dealt with practically in America. It is not comforting to find my New York correspondent who believes in the righteousness of Betterment taxation writing to me as follows. 'There is no doubt that if this' (the Strand Betterment scheme) 'is your first betterment assessment proceeding an immense amount of litigation must necessarily grow out of it.' My correspondent is quite competent to form an opinion, for he was for years a member of a Commission appointed by the New York State Legislature to revise and correct assessments for local improvements in the city of New York. This commission was appointed in June 1880 and sat until December 1886, and the nature of the work done by it may be gathered from the following extracts from the minutes of its final meeting:—

'Mr. James A. Deering, on behalf of the attorneys, representing the property-owners, before the Commissioners, asked leave to insert the following in the minutes of this day, viz.: "At the close of the labours of the Commissioners, the representatives of the property-owners, who have submitted to their review and determination, claims for relief from very many onerous and in many cases ruinous assessments imposed to repay the cost of street improvements, deem it proper to place upon record their appreciation of the care and attention which the Commissioners have at all times given to the investigation of every claim for relief, to their uniform courtesy to counsel, their clients, and their witnesses, and to the fairness of their decision upon the testimony presented. The system of local improvements sanctioned by law prior to the Charter of 1873, the very many special and often inconsistent laws relating to public works in this city, the very large sums expended therefor, the peculiar or special character of the principal improvement made, the method of assessing and distributing the expense incurred, and the difficulty of estimating the real value of the work done or its value as an improvement, made the work of the Commissioners exceedingly difficult and tedious, requiring the most careful examination to reach an equitable conclusion. We know

of no instance in which that care and patience has not been given, and we deem the decision made by them, under all the circumstances of each case, satisfactory both to the city and to property-owners."'

A reference to other minutes of the Commission shows that speaking generally the assessments made were reduced.

It would be impossible except by greatly lengthening this paper to give particulars, but it may be mentioned that on one day the following minute was made:—

'Assessment for Tenth Avenue grading, &c., from Manhattan Street to 155th Street—confirmed Nov. 12, 1885.

No.	5706	reduced	from	$1232·50	to	$862·75
„	5709	„	„	1485·12	„	1039·58
„	5754	„	„	5527·04	„	3868·93
„	5757	„	„	650·—	„	455·—
„	5759	„	„	3133·51	„	2193·47
„	5761	„	„	2065·—	„	1445·50
„	5763	„	„	885·13	„	619·59
„	5765	„	„	1817·07	„	1271·95
„	5767	„	„	852·65	„	596·86
„	5768	„	„	677·40	„	474·18
„	5770	„	„	1502·65	„	1051·86
„	5773	„	„	1755·48	„	1228·84
„	5774	„	„	2881·02	„	2016·72
„	5777	„	„	5157·50	„	3610·25
„	5779	„	„	227·50	„	159·25
„	5785	„	„	97·50	„	68·25
„	5786	„	„	528·35	„	369·85
„	5787	„	„	65·—	„	45·50
„	5788	„	„	45·50	„	31·85
„	5792	„	„	1511·58	„	1058·11
„	5793	„	„	2932·63	„	2052·84
„	5795	„	„	677·40	„	474·18
„	5796	„	„	1100·—	„	770·—
„	5799	„	„	2213·72	„	1549·61'

This is a specimen and a fair specimen of the work of the Commissioners, and it may be asked whether it is desirable to introduce into our system of law a principle which bears such fruits where it is best known and most appreciated. A Boston correspondent of mine says, speaking of this doctrine of Betterment, 'There are a great many American doctrines which it would *not* be well for England to imitate,' and he speaks from experience. It will be noticed that the sums dealt with by the New York Commission are capital sums, and some of them of considerable amount; but of course the principle is the same whether it be worked out on the

lines of capital value or on the lines of annual value. Speaking for myself it seems to me that when dealt with as a capital sum less injustice is likely to be done than if annual value were dealt with.

But the persons insisting on the adoption of Betterment are so persistent (and it may be added so powerful) that it is necessary to consider in what way the principle, if it is to be adopted in this country, ought to be modified so as to do the least possible amount of harm and the greatest possible amount of good.

On this point the following considerations occur to me—

First of all, the question of adoption should not be left to be discussed and decided on what is practically a private Bill, such as the Strand Improvement Bill. The Betterment principle is, or rather will be, a new departure in this country, and as such it should be dealt with as a matter affecting the public generally and not merely a section of the public, even if that section be so important a one as the inhabitants of London. Besides it is not fair to the inhabitants of a particular locality to have to contest before a private Bill Committee a question of the kind, and on the other hand it is not fair to the public authority that a Committee should have the power of practically giving the go-bye to the question, as was done by the Committee on the Strand Bill, when they decided to exclude evidence as to American law and practice of Betterment.

Evidently what should be done is to appoint a Committee or (what would be better) a Commission to inquire into the matter generally and report all the information that can be obtained about it.

The Commissioners for inquiring into the Housing of the Working Classes did to some extent investigate the question, but it was only the fringe of it that they could touch, and they reported that 'there are great practical difficulties in working out the idea,' and that 'local opposition to improvement schemes might be increased by the adoption of the principle.' In the latter observation they have been proved to be correct, and no one has yet suggested how the great practical difficulties they referred to are to be got rid of.

But assuming for the sake of argument that Betterment in some form must be adopted, it may be asked, is there no way in which the objections to it may be at least minimized?

I think there is a way, and that section 5 of the Artizans and Labourers Dwellings Act 1869 shows what it is. That section is as follows:—

'Notwithstanding anything in the Act of 1868 contained, the owner of any premises specified in an order of the Local Authority made under that Act and requiring him to execute any works or to

demolish such premises, may within three months after service on him of the order require the Local Authority in writing to purchase such premises.'

The contest on the Strand Improvement Bill resolved itself into the question whether Betterment or Recoupment was the correct principle on which to work out improvements—that is, whether it was desirable to give public authorities power to purchase the improved properties at their pre-improvement value, to be resold at the improved value, or whether the improved value should be reached by Betterment taxation.

Applying the precedent of section 5 of the Artizans Dwellings Act 1869, I would suggest that a man on whom it was proposed to levy Betterment taxation, should be able to say, 'I don't believe in the Betterment—I prefer to be bought out'; and conversely I would suggest that a man whom it was proposed to buy out should be able to say, 'I prefer to stay and pay a Betterment tax.'

This would probably prevent any attempt on the part of local authorities and their officials to deal unfairly with those who might be affected beneficially by improvements, and would at any rate cause them to pause before attempting to apply this new-fangled doctrine of Betterment, a doctrine obviously very difficult to work out practically without injustice to those who are to be the subjects of it.

JOHN R. ADAMS.

SPECIAL INDORSEMENT OR ORIGINATING SUMMONS.

IN the January number of this REVIEW appeared an Article entitled 'Special Indorsement or Originating Summons,' which was devoted entirely to praise of the former mode of procedure and to disparagement of the latter. The introduction of the originating summons in 1883 was very plausibly represented as a retrograde measure, and in so far as the writer's argument was insufficient to support his contention he supplied its place by copious ridicule of Chancery lawyers and Chancery procedure. I have no wish to retort upon the author in the same vein, for the question that he has raised is an important one, and worthy of discussion from a more philosophic standpoint. The opinion of Mr. Snow upon questions of practice must of necessity carry so much weight that there is all the greater need for a protest on behalf of those practitioners who do not share his views, and that must be my excuse for entering the lists against him.

Let me admit at the outset that the specially indorsed writ has proved a great boon to *bona fide* plaintiffs. Few people who know how it works would deny its value, but its useful functions are, in its present shape, strictly limited. The question raised by Mr. Snow and answered by him in the affirmative is shortly—can the specially indorsed writ be adapted so as to meet a certain class of cases, not being liquidated demands, in which a summary means of obtaining a judicial decision is badly needed? With all deference to Mr. Snow I think not. Mr. Snow calls the specially indorsed writ an elastic instrument. I must say that it seems to me to be the reverse. I should say that it was not elastic, that it never was intended to be elastic, and that if it were so altered as to include any claims other than those for which it was created its efficacy would be largely destroyed. That it could be so altered as to cover other cases I do not deny, but I maintain that such alteration must be in the direction of the Chancery originating summons. It is true that the modified instrument might still be called a specially indorsed writ, but the two forms would be so different that they would have to be distinguished in practice, and if there are to be two different kinds of specially indorsed writ applicable to two different classes of actions surely it will be better to have a com-

prehensible distinction in their nomenclature instead of calling one, say, a specially indorsed writ for liquidated demands, and the other a specially indorsed writ for declarations of right. This however would be a mere matter of convenience, and if any inconvenience would flow from the use of the words 'originating summons,' by all means let the new instrument be called a specially indorsed writ of some particular character. Only, and this is the important point, do not let us be deceived into thinking that because an old name has been retained no new machine has been created. There are machines for cutting hay and there are machines for cutting lawns, which may both be called mowing machines, but this would not justify the supposition that a hayfield could be cut with a lawn mower.

If we look at the circumstances under which the proposal to introduce the originating summons into Common Law practice has arisen, and if we consider the class of cases for which it is to provide, it is perfectly clear that nothing less than a new machine will serve the purpose. At the present moment there are a great number of disputed points which are not brought into the Common Law Courts, because there is no means of obtaining speedy judgment notwithstanding that the question at issue lies in a nutshell. As a natural result such cases are taken to that tribunal which provides a machinery for prompt settlement. We are left in some doubt as to whether Mr. Snow admits the necessity of any alterations in procedure or not, but on the whole it would appear that he does admit the need of some reform. At the same time he tells us that any two litigants agreed upon their facts can have a cause set down by consent without pleadings and so obtain every benefit that can be expected from the originating summons. But in such cases everything turns upon 'consent,' and consequently that method of procedure gives us no help in those cases which could be easily dealt with in a summary manner, but in which one of the parties refuses his consent to any relaxation of the legal forms. What the Common Law wants, but what it does not possess except for liquidated demands, is a form of action whereby in a proper case a question can be brought to trial in a summary manner without pleadings. The object of such a procedure would be very different from that with which the existing specially indorsed writ was framed. The object of the last named procedure is to prevent a defendant who has no case from defending an action. The new procedure is needed to enable parties to take the opinion of the Court upon documents whose language is doubtful or obscure. The Chancery Division has in the originating summons a machinery which can lay claim to the advantages which the specially indorsed

writ lacks, a machinery which is made use of to an incredible extent, and which is truly elastic, and the common lawyers ought not to be blamed if they seek to naturalize such an admirable plant in their own gardens. The only fear would be that their soil would not suit its growth. That is to say, it may be a legitimate matter for doubt that the machinery wielded by the Common Law Masters would permit of such a free development as has taken place in the chambers of the Chief Clerks.

If Mr. Snow would show us how the specially indorsed writ could be made to serve the purpose of the originating summons his invective would have more weight, but he does nothing of the kind; he only deals in generalities. And yet without a clear conception of the purposes to which the two instruments are to be applied no discussion on the subject can be of value. It must not be lost sight of that the functions of the originating summons are totally distinct from those of the specially indorsed writ. The use of the latter is to raise with the least possible delay a clear and distinct issue of fact and to enable the plaintiff to obtain judgment at once. It aims at preventing a shifty defendant from eluding his obligations by an unconscientious use of the formalities of the law. It exists for the advantage of the plaintiff and for the punishment of the defendant, and if employed by a plaintiff improperly it sometimes causes considerable trouble at subsequent stages of an action, owing to the fact that no statement of claim is delivered beyond the meagre statement on the back of the writ. The use of the former is not only to obtain cheaply and quickly a decision upon some point of difference arising in those numerous cases where the aid of the Court is required, and which can easily be determined without pleadings, but also to obtain orders which may be almost designated orders of course—such for instance as the distribution of funds in Court.

If the Common Law Courts have a desire to deal with any such cases they must create a new procedure for the purpose, and I repeat that any new machinery to carry out their intentions must be in the nature of the originating summons. The exigencies of suitors require a flexible system of procedure, and it would be as absurd to try and tie down all litigants to one form of writ as it would be for a highly civilized society to go to battle, to cut its food, and to shave itself with one and the same edge tool, although we are told that such is the custom amongst some barbaric tribes.

It seems to me that underlying Mr. Snow's argument may be traced the old Common Law jealousy of the Court of Chancery. The same feeling that narrowed down the suitor to a limited number of forms of action into which he had to squeeze his claim

for redress still pervades the Common Law mind. It almost comes to this, that the Common Law will not try any questions of rights and liabilities without the whole paraphernalia and machinery that attend a bitterly disputed action at law. It cannot understand that two disputants may often be willing to accept without ill feeling and hostile litigation the decision of an impartial mind upon a given set of facts upon which they may have an honest difference of opinion. The consequence appears to be a steady tendency for the Chancery Courts or independent arbitrators to absorb more and more of the business of the Law, and to turn the civil Common Law Courts into special tribunals for the trial of semi-criminal actions such as libel and slander, or those arising out of personal injuries or breaches of promise of marriage.

Mr. Snow lays great stress upon the intentions of the wise men and great lawyers of 1873-5 to establish uniformity, and he tells us that the Judicature Acts swept away the various modes of commencing proceedings which then existed and declared that every action thenceforth commenced in the High Court of Justice should be commenced with a writ of summons. But this is not quite true. No doubt the lawyers who framed the Judicature Acts did aim at uniformity of procedure, but they had no intention of allowing a passion for uniformity to over-reach its mark by injuring instead of benefiting suitors, and although they assimilated the machinery of the law where necessary they neither abolished the statutory originating summonses of which Mr. Snow speaks, and which no doubt gave birth to the originating summons of 1883, nor did they abolish that valuable and well established system of proceeding by petition in Chancery, a system that still flourishes, and which, notwithstanding the increasing competition of the originating summons, there is every reason to believe will continue to flourish for many years to come.

It seems to me that instead of being a retrograde movement the establishment of the originating summons was a progressive one, and that by opposing its extension Mr. Snow sacrifices to the fetish of uniformity the real efficacy of those methods of procedure which he does so much to elucidate for us.

R. B. P. Cator.

THE BASIS OF PRIVATE INTERNATIONAL LAW.

Current Theories of the Nature of Private International Law.

A THEORY almost peculiar to certain eminent English writers on law is that the body of rules which prescribe the occasion and limits of the inter-territorial application of law has no relation whatever to international law. Professor Holland formulates this theory with vigour and precision: 'Il y a des auteurs dont le langage pourrait faire supposer qu'il existe un droit international, pour ainsi dire, dans l'air. Selon nous, c'est une erreur contre laquelle il importe de se prémunir. En realité, à côté d'une théorie, ou plutôt de plusieurs théories très discutées, on trouve dans chaque pays des règles sur le conflit des lois, tantôt ressemblant, tantôt ne ressemblant pas, soit aux règles des autres pays, soit à celles que pose la théorie. M. Dicey a compris cette vérité. Il parle avec un mépris mérité de cette expression si impropre "Le droit international privé"' (Rev. de D. I., xi. 466). In his 'Jurisprudence,' p. 353, he speaks of an 'erroneous impression that there exists something like a common law of civilised nations upon this subject, instead of, as is really the case, a gradual approximation of national practice, guided to some extent by a growing body of theory.' 'It is of course a merely voluntary act on the part of any state when it gives effect to foreign law.' '"Comity" thus expresses the truth that the adoption of this or that rule by a state is a matter of indifference to international law.' Professor Dicey (L.Q.R., Jan. 1890) repudiates the authority of Savigny's 'Common Law of Europe.' In his 'Law of Domicil' he refers to 'the subject called by an unfortunate misnomer "Private International Law."' He treats the subject of domicil as nothing but a branch of the municipal law of England, and adds (p. iv, Preface): 'The treatment here adopted . . . . completely avoids the errors which have arisen from confusing the rules of so-called private international law, which are in strictness "laws" but are not "international," with the principles of international law properly so called, which are international since they regulate the conduct of nations towards each other, but are not in the strict sense of the term "laws."'

Other English writers treat the matter exclusively as a branch of English law—a method of treatment which conveys the idea that the matter requires no discussion from an international stand-

point. But at the same time it is quite consistent with the recognition of international obligation.

The theory propounded by Professor Dicey and Professor Holland may be described as the insular view of the matter, although by no means held by all English writers. These writers do not seem to attach much importance to an analysis of the 'comity of nations,' on which the recognition of foreigners' rights and the inter-territorial application of law has been for over two centuries supposed to depend, but I think it may be said that if 'comity' is to harmonize with their views, it must be understood in the sense of 'revocable concession.'

Now before going further, it is highly important to realize that this theory—that the inter-territorial application of law is in no respect a matter of concern to international law—is totally opposed by the almost unanimous opinion of jurists from the time of Grotius to the present day. It is distinctly contrary to the authoritative decisions of English tribunals, and to the legislation of Parliament. It is at least worth considering whether it is a politic view to hold of the law affecting foreigners' rights, and whether it is a just view.

With an exception which I shall mention presently all the other theories current among jurists or tribunals are based on the idea of the comity of nations, which leads sovereign states *ob reciprocam utilitatem* extra-territorially to apply the law of other states, where necessary, for the extra-territorial recognition of foreign subjects' rights[1]. The 'courtesy' and 'mutual goodwill' of states supply the chain of the law to the foreigner's legal position abroad. As each state can prescribe the limits of its application of foreign law, the duty is one of imperfect obligation, and its non-performance is not a just cause for war. But imperfect obligation does not mean non-existent obligation. The minor sanctions of international law are invoked to support it *ab initio*—retaliation and retorsion. 'Quod quisque juris in alterum statuerit ut ipse eodem jure utatur.' 'Comity,' to Professor Holland a mere symbol of negation—a formula of denial that international law is concerned at all, has furnished for centuries, under the guidance of the orthodox jurists, a real basis for international duty and foreigners' rights. Furthermore, the graver sanctions of international law, from reprisal to war,

[1] For the general acceptance of the theory of 'Comity' and the sanctions attached to its violation, see Phillimore, iv. sec. 16; iii. p. 16; Fœlix, Pref. (Retorsion against France); Klüber, secs. 54, 58, 234; Martens, sec. 35; Heffter, sec. 110 (112 French edition), 'Die Retorsion ist eine Reaction gegen eine Iniquität (jus iniquum), die Repressalien reagiren gegen eine Ungerechtigkeit (injustitia);' Bar, ii. sec. 27, replying to Pfeiffer; *De Benedetti* v. *Morland*, 1879, an Italian Court entertains suit *jure retorsionis* against Frenchmen, J. D. I. P. English decisions—Lords Nottingham, Ellenborough, and Kenyon.

attach to the violation of rights which theoretically might have been given or withheld, being within the province of 'comity,' if they have been allowed to ripen by prescription; and also attach to a clear denial of justice to foreigners.

The theory formulated by the genius of Savigny is that of a common law of civilized states. In the eighth volume of his 'System' he says that 'the admission of foreign statutes may be regarded as a friendly concession amongst sovereign states.' 'But this concession must not be regarded as mere generosity or the revocable act of an arbitrary will, which would imply that it was uncertain and temporary.' 'It is rather to be regarded as a proper and progressive development of law following in its growth the same course as the rules on collision of law between the local laws of a single state.' The true theory is that of a community of law among independent states. The general belief that it exists and the common effort to define its rules are proof of its existence. Division of opinion as to these rules is merely a characteristic of growth. This view is in harmony with the general conception of law attained to by the greatest of modern jurists—which leads him, with deep insight into the inner nature of all legal phenomena, to posit law in the consciousness of the people—the written law being the accidental and imperfect expression of the already existing reality[1].

Sir Robert Phillimore expressly adheres to Savigny's philosophic conception, holding that private international law or 'comity'—like public international law—is 'built upon the hypothesis of a common law for a commonwealth of states[2].' Professor Von Bar's authority is to be reckoned on the same side. The application of foreign law is to be regarded not as a 'comitas' pure and simple, but rather as Lord Brougham views it (quoted in Story, sec. 226 note), as a *debitum justitiae*, a *Rechtspflicht*—which takes its origin in that friendly intercourse described as 'comitas gentium.' He postulates the authority of a general consuetudinary law for the states of Europe as an aid to interpretation in isolated points, but private international law rests on the nature of things[3]. Professor Westlake speaks of the civilized world as a united whole for the acquisition of rights on which modern society depends. The idea of comity has given place to that of justice[4].

Laurent, in his severe onslaught on Anglo-American realism, does not seem to give us credit for having at a comparatively early

[1] Savigny, System, vol. viii. secs. 348–9; vol. i. sec. 7. [2] Phillimore, iv. p. 9.
[3] Bar, i. sec. 32, 1889.
[4] Westlake, ch. xix; Brougham, 1836, *Warrender* v. *Warrender*, 2 Cl. & F. 488; *Yates* v. *Thompson*, 3 Cl. & F. 544; Kent, ii. 611, 'claim of justice, perhaps of imperfect obligation.'

period put forward legal obligation rather than comity as the ground for extra-territorial application of foreign law. Baron Parke in 1845 denied comity to be the ground for our courts' action. It is recognition of a legal obligation. This doctrine was approved of in *Schibsby* v. *Westenholz*, 1870, and *Godard* v. *Gray*, 1870[1]. This view necessarily assumes that the foreign legal obligation, and therefore foreign law, has force here. Whether *proprio vigore*, or through international law, or through the 'common law' to which Lord Blackburn refers, is not clear. Still, the doctrine marks an unmistakable advance, with which Continental writers have not as yet credited us.

The latest theory of the basis of private international law is marked by its emphatic repudiation of comity or courtesy or 'self-interest'—Laurent holds them to be convertible terms—as the basis for the extra-territorial recognition of foreigners' rights and for the extra-territorial application of foreign law. The new Italian school, as it is called, might more properly be described as the Latin school. It counts among its adherents eminent writers in France, Belgium, and Spain, as well as Italy. Mancini is recognised as the founder of the school, having sustained its theory as far back as 1853. Substantially, its view of the basis of private international law is that of Savigny, omitting that great jurist's merely argumentative and verbal recognition of 'Comity.' The obligation on a state to apply foreign law is a 'Devoir rigoureux de justice internationale,' based on a 'Communauté de droit,' arising from human nature and binding states as members of the 'respublica maxima gentium[2].' The further theories of the school I need not here enter into. They present their double criterion of nationality and territoriality (for the personal and real statute respectively) as a substitute for Savigny's test—'die viel bewunderte und viel citirte formel,' as Von Bar describes it—the law of the territory to which the jural relation by its proper nature belongs—'Recht des Sitzes der Rechtsverhältnisse.'

The view of the subject which I am about to present is briefly as follows:—The law administered in our courts on the inter-territorial application of law has not throughout the same basis of right and duty. One branch has behind it two sanctions—that of international law and that of English law. The other branch has only one sanction—that of English law pure and simple.

[1] L. R. 6 Q. B. 139, 155. See also Wensleydale in *Fenton* v. *Livingston*, 1858.

[2] Mancini, Rapport a l'Institut de Droit Int. 1874; Rev. D. I. vol. vii. 329; Fiore, D. I. P. ch. v. secs. 35–37; Laurent, Droit Civil Int. i. 12, 402, 503; Weiss, D. I. P. xxxiii. 'L'usage commun des nations,' sec. 232; B. Laurence, Com. on Wheaton, p. 108, 'a kind of Common Law;' Brocher, Rev. D. I. 1880, 531; Esperson, Il Principio di Nazionalità, xvi.

It will be seen from the following pages in what respect this view differs from or approximates to any or all of the theories described above.

I may premise that I consider the recognition of the international duty, where it exists, as the chief matter of importance in this connection.

Relation of International Law to the Law of England.

Let me state briefly what I conceive to be the relation of international law to the law of England. International law is a body of customary rules evolved among the family of nations, the inheritors of European civilization, and prescribes their mutual rights and duties. It is primarily referable to that group of nations only. It is binding on them either as held by the United States Supreme Court as a condition of their admission to the circle of nations or as is held by English courts through their implied assent. It is the duty of each state to so shape its municipal law as to enable it to fulfil its international obligations. Like all customary law international law is based on a slowly changing body of usage to which it automatically adjusts itself. It is always a question of evidence whether any given rule is or is not a part of any system of customary law; and the custom of nations, like the custom of merchants, is for ever being modified. It shares with all customary law the advantages of its suitability to the wants and necessities of those affected by it, and the disadvantages of occasional uncertainty. The formulation of this body of rules as distinguished from its originating or its sanctioning causes, is to be found in the writings of the jurists, from Grotius to the present day. This mode of formulating systems of law is as ancient and as respectable as enactment by parliaments or judges. It is at least as certain as formulation by the testimony of merchants. In every species of solemn form, the governing and educated classes of Europe, and of the mighty states which have sprung from its civilization, have given their reiterated adhesion to this formulation of international law by scientific discussion—directing and voicing the opinion of the peoples. English tribunals and those of all states of the family of nations hold the agreement of scientific writers to be evidence of the assent of the states. On the jurists not Caesar but the civilized world has conferred the *jus respondendi*. In Savigny's philosophical conception, the specialisation of functions in the evolution of law has presented the jurists as the organ for the declaration of the law existing in the common consciousness of the people.

The sanctions behind this body of law, far from being inferior, transcend immeasurably in force those of municipal law. They

range from the general disapproval of states to war. The certainty with which the sanctions are applied, though sometimes less is often greater than that affecting the sanctions of municipal law. The theories on this subject of Austin, the founder of the English analytic school, are not merely idle but dangerous. His denial of the name 'law' to this body of rules on the ground that law proceeds from a determinate source and rests on a sanction of physical compulsion is doubly invalid. International law resting on the necessary principles of justice would be law if it had neither of these characteristics. In fact it has both.

Division of the Topics of Private International Law:—Difference in Subject-Matter.

It is tacitly assumed by some writers that the only question which can arise in connection with the extra-territorial application of laws is that usually described as a 'Conflict of Laws'—when the foreign and the domestic law differ in substance. Fiore points out that Fœlix confuses the question—What are foreigners' rights? with the question—In case of conflict of laws, which law is to govern[1]? Savigny and Wächter had already shown from a different standpoint the impropriety of fixing the attention exclusively on questions of conflict, instead of endeavouring to define the sphere of each national law.

The truth is that in every case in which the legal right of a foreigner acquired abroad is recognised there is *pro tanto* an extra-territorial application of foreign law, inasmuch as the right in question grew up under the protection of the foreign law. That law thus is recognised and its consequences perpetuated, even though it be in harmony with domestic law.

Pursuing our inquiry, we find that the following subjects fall under the extra-territorial recognition of legal rights and the extra-territorial application of foreign law. I shall here take the doctrine of 'comity' as marking the acknowledged minimum of state duty to the foreign state.

I. Foreigners' Rights and State Rights.

1. Right of foreigners to be admitted to the territory. The state's duty is one of imperfect obligation, resting on comity. The penalty for disregard of the duty is retaliation and retorsion.

2. Right of foreigners if injured to obtain justice at the hands of the state and to have access to tribunals. The state duty is one of perfect obligation—a *debitum justitiae*. It rests on international law,

[1] Fiore, sec. 37: see, as to foreigners' rights, Esperson, p. viii.

strictum jus not comity. The penalty for disregard of the duty, for 'déni de justice,' is reprisal, and may be war, subject to the discretion of the injured state[1].

3. Right of foreigners to have their law applied to jural relations affecting their private rights. The state's duty rests on comity.

4. Right of foreigners to equality with subjects as regards private rights. The state's duty rests on comity.

5. Right of state to exclude foreigners from participation in the privileges of public law; to subject foreigners to the public criminal law; to limit the extra-territorial recognition of private rights when such rights interfere with the public rights of the state. The state's rights rest on strict international law.

6. Right of state to subject foreigners to its prize courts administering international law. The right rests on strict international law.

7. Right of state to assume jurisdiction over foreigners in private suits in either voluntary or contentious jurisdiction. The state's right rests on strict international law. (Its duty has been referred to above (2).)

8. Right of state to receive foreigners into its territory. The right rests on strict international law.

This enumeration is sufficiently accurate for practical purposes. It renders obvious some of the inconsistencies of the theory of comity. What is important to note is that only when these questions have been determined do we come to the topics supposed by some writers to exhaust the subject of the extra-territorial recognition of rights and application of foreign law. These are—

II. Conflict of Laws and Jurisdictions—Delimitation of the spheres of State laws.

1. *Forum.* What tribunal, from the juristic standpoint of justice and propriety, is competent to decide suits in which the application of foreign law has to be considered—owing to the presence of a foreign litigant, or to the fact that a thing in dispute exists or an act was done abroad?

2. *Lex.* What law, in case of conflict of foreign and municipal law, should be applied to the jural relation? (The law must be either municipal law applied territorially or extra-territorially or foreign law extra-territorially.)

This division, based on difference in the subject-matter of the rules, shows the true extent of the field of Private International Law, but it does not show the dividing line between the international

[1] Martens, iii. secs. 83, 96, 'déni de justice;' Heffter, secs. 33, 60, 110; Bluntschli, secs. 384, 466; Pascaud in Rev. D. I. 1889, 448; Woolsey, secs. 63-79; Res. Inst. D. I., Lausanne, 1888.

and the municipal sanction behind the rules. This may now be attempted.

Division of the Topics of Private International Law:—Difference in Persons.

To my mind the chief cause of the obscurity which has reigned as regards the scope and force of private international law has been the disregard shown, from a variety of causes, to difference of political status. I shall therefore divide the topics on a hitherto neglected principle, that of difference in persons.

It is obvious that in suits between subjects, in which no foreigner is a party, although the question concerns the extra-territorial recognition of rights and the extra-territorial application of foreign law, only the juristic questions of *forum* and *lex* need be considered. In such suits no foreign state can possibly have any right to interfere: there can be no question of international law, of diplomatic remonstrance or of foreign retaliation. By setting these suits in a separate category we clear the field of inquiry—we keep distinct all political questions from questions merely domestic. Again, the points to consider in relation to subjects alone are fewer, being purely the juristic questions of *forum* and *lex*—another reason for keeping the class distinct. Lastly, as I have indicated, we help to lessen the obscurity as to the true scope and character of private international law, illustrated as for instance it has been in that definition of the subject to which M. Weiss objects—'le droit qui régit les rapports entre les particuliers de nations différentes.' M. Weiss points out that if an Englishman dies in France leaving only English heirs, a question of private international law arises—although no private person of any nation but England is concerned [1].

Taking therefore the difference in persons as the guiding principle, and bringing into separate categories all questions of jurisdiction over foreigners on the one hand and on the other, all questions of the extra-territorial recognition of rights and extra-territorial application of foreign law where subjects alone are concerned, the questions would be divided as follows—

I. Jurisdiction over foreigners.

In War, jurisdiction is exercised—

1. Over enemy subjects. English law, consisting of the army regulations, &c., based on international law, is applied by courts-martial.

[1] Weiss, 24.

2. Over neutral subjects. English law, contained in the Naval Prize Acts, &c., enforcing international law, is applied by prize courts.

In Peace, jurisdiction is exercised—

3. Over foreign subjects. English public law, consisting of criminal law, police and fiscal regulations, and constitutional law, is applied, subject to the international law rules as to foreigners' rights. The foreigner's right to justice involves the application of juristic rules as to *forum* and *lex*.

(In the foregoing cases the state is, in the following it is not, a party.)

4. Over foreign subjects. English and foreign private law is applied subject to international law rules as to foreigners' rights, involving juristic rules as to *forum* and *lex*.

II. Subject litigants, and the inter-territorial application of law.

Jurisdiction is exercised—

5. Over subjects. English and foreign private law is applied, subject to juristic rules as to *forum* and *lex*.

Scope of Private International Law.

Most English writers include under this head of law only those topics of Private Law included in the fourth and fifth sections foregoing [1]. At the same time, they do not treat the subject at all in view of its relation to foreigners' rights under international law.

Continental writers, on the other hand, never for a moment lose sight of that relation. From their standpoint, that of the legal rights of the individual when in the territory of another state than his own, they include the topics of Criminal Law (State Public Law, sec. 3) as well as of Private Law (secs. 4 and 5). It appears to me that from that standpoint the first four sections should be included (Jurisdiction over Foreigners in War and in Peace), and the last omitted [2].

However, it is of course true that it is within the discretion of a writer to decide in what way he will treat any subject of law. Any arrangement of the topics is justifiable, provided it does not

[1] Phillimore, iv. 767, holds Criminal Law not to be a part of Private International Law but of Public Law; Foote, same; Westlake, chap. xix, says that the subject should include Criminal Law, but such treatment would not be convenient for an English book.

[2] Fœlix, 'Droit international privé se compose de règles relatives à l'application des lois civiles et criminelles;' Mancini, Rapport, supr.; Bar, first edition includes Criminal Law.

lead on the one hand to supposing that the law of nations has nothing to do with the subject, or on the other hand to assuming that there is not a region of the inter-territorial application of law within which municipal law is supreme.

It is to be noted that the distinction I draw as marking the sphere of influence of the law of nations is not the same as that drawn by some Continental writers, who regard all cases of conflict between foreign and municipal law as affecting international rights, whereas conflicts between different municipal laws of the same state according to them have no international effect. That distinction is one of laws. The one I have drawn is of persons.

Relation of Private International Law to the Law of Nations.

It is obvious, bearing that distinction in persons clearly in mind, that there is a definite relation between private international law, in whatever sense that term be used, and the law of nations. It arises from that necessary and acknowledged right of states to protect their subjects abroad, 'maxima et necessaria cura pro subditis.' It arises from the corresponding responsibility of the state for the action of its administration, of its tribunals, and of its subjects, towards the subjects of another state. Wherever foreigners are concerned, international law as to foreigners' rights underlies the English rules as to the inter-territorial application of law as international law as to neutrality underlies the Foreign Enlistment Act, or as international law as to blockade and contraband underlies the Naval Prize Act.

On the other hand, when subjects alone are affected by the English rules as to inter-territorial application of foreign and municipal law, the law of nations is silent, or, if it speaks, it is but to assert the independence of the English law, arising from the independence of the state and its exclusive jurisdiction within its territory over its own subjects. It is indeed the international legality of the insular view in this respect that has so largely contributed towards obscuring the true character of the problem.

I might here regard my argument as concluded. The position I started to contravert was that there was no relation between our rules of extra-territorial recognition of rights and the law of nations. Having now made it plain that there is a relation, it is not necessary for the purposes of my argument to endeavour to precisely define what is the effect of that relation. If general recognition be secured of the truth that there is a question of our international legal relations involved, much would be done for interests

other than merely juristic, as international law is perfected through public opinion. Again, from a juristic standpoint alone, to thoroughly define the outlines of the problem is half to solve it.

Nevertheless, we may consider to some extent the effect of the relation of the law of nations to the subject under discussion. For this purpose it will be more convenient to confine our attention more particularly to the questions of private law, as that is the usual course adopted by English writers.

The Inter-territorial Application of Private Law to Foreign Litigants.

The right of the state to protect its subjects abroad and to secure extra-territorial recognition of their rights is one of the oldest and most firmly established under the law of nations. Postulated by Grotius as necessary, our government is historically identified with its vigorous assertion. That the subject abroad must be treated with justice has been our historic policy, continued to the present day, and asserted whether injustice be done by foreign executives, tribunals or subjects [1].

As regards especially treatment of subjects by foreign laws and tribunals, absence of remedy by law or unfair incidence of law, as well as cases of corruption, oppression or inaction of tribunals, will justify state interference [2].

The state's international responsibility for the action of its tribunals and for the incidence of its laws as regards foreigners is equally well established. In the special case of judicial misconduct, the individual functionary is usually exempted by municipal law from personal responsibility, but the government is bound to compensate the aggrieved foreigner and to legislate, if necessary, for that purpose [3].

As regards states not members of the family of nations, our interference with the action of their tribunals and the incidence of municipal law takes the extreme form of removing our subjects from the jurisdiction of their judges, although resident within their territory. Our placing our subjects within the jurisdiction of the family of nations arises from the fact that we expect them to

[1] See case of Turkish brigands, June, 1891; British Government and Portugal, 1890; Italy and U.S.A. (New Orleans Lynching Case).

[2] Parl. Papers, 1861, vol. 65, British Government and Prussia; case of Don Pacifico, 1850, British Government and Greece; British Government and Naples, 1840.

[3] Hall, Int. Law, i. chaps. iv. and vii; Bluntschli, 466, 380, where he says it has been made a matter of reproach to England her readiness to interfere, 'par voie diplomatique;' Heffter, sec. 59, 'Jus protectionis civilis in specie jus representationis omni modae;' Martens, secs. 96, 97; Phillimore, iii. 20, 57.

receive justice, there being among all these nations a substantial agreement as to the basis of legal rights.

There would seem to be some show of reason in the reproach which one hears made against the 'Anglo-Americans,' that notwithstanding the vigorous policy of their governments in protection of their citizens abroad, their writers have seriously diminished the respect due to, and the security of foreigners' rights. Story, for instance, is accused of having so attenuated, so explained away, the received doctrine of comity, that having found it national duty originating in courtesy and mutual goodwill, he left it national caprice resting on the basis of self-interest. 'Dans la doctrine anglo-américaine,' says Laurent, 'il ne faut plus parler de devoir ni de droit, pas même moral. La comity n'est en réalité que l'intérêt.'

There seems so much truth in the accusation that it is worth considering whether the tendency has been manifested in regard to other accepted principles of the law of nations. The appeal to the necessary principles of justice which is made by the Italian school seems somewhat rhetorical to our writers, who think it merely a question of the letter of the bond, of the average usage of the nations; each nation seeking to perform merely the minimum of justice and duty to be deduced from that usage, and only from that usage which is universally established. Yet when we turn to the law of nations as it existed at least a century ago and exists now, what do we find? That the obligation of a state to render justice to the foreign litigant has never been placed on the ground of comity. It is, and always has been, a duty of strict law of the most stringent obligation, enforceable by all the sanctions of the law of nations.

Let us see what that duty is, according to recognised authorities, excluding writers of the Italian school. Sir R. Phillimore thus summarises the existing rule: 'Justice administered partially, and in a different manner to the foreigner than to the subject, or with a denial or omission of any of the incidents essential for ascertaining the truth, would in fact be injustice and would warrant reprisals.' III. 23. G. F. Martens, writing in 1788, says, 'Tout état est strictement obligé d'administrer aux étrangers une justice aussi prompte et aussi impartiale qu'aux naturels du pays.' Sec. 96[1].

There can be little doubt that such being the provisions of the law of nations a century ago that had it not been for the attenuation of the basis of foreigners' rights effected by the 'Anglo-American' theory of comity, this duty of extra-territorially applying

[1] For cases of reprisal by British Government, 1840 and 1850, see last note. See also Grotius iii. ch. 2, 'Ubi jus denegetur;' Ortolan, Dip. 389; Heffter, 110; Bluntschli, 380, 460.

foreign law whenever it is juristically necessary for the conservation of such rights, would have been long since an unquestioned rule of the law of nations. The amelioration in the condition of foreigners—the widening of the boundaries of their sphere of right—effected by the advance of civilization and of personal liberty within the last century have, it is true, increased that measure of performance which now constitutes justice, but not its essential obligation, which is in each century the same.

As a great English jurist, in his last published work, has not inopportunely reminded us, there is a natural as well as a positive law of nations—its provisions spring from the duty of international justice. We ought not to encourage the dangerous delusion that governments and tribunals are not as strictly bound by justice in relation to the foreigner as to the citizen [1].

Taking justice to the legal right of the foreigner as our standard, it is not difficult to follow the reasoning of those who deduce the established limitations to the exercise of his right in territory other than that of his own state, from the principle of the necessity to maintain the existence and order of the state. Public municipal law is applied to the foreigner because the state is directly affected, and justice requires that his private rights should give way to that of the community. Again, it is often in criminal law not a question of the foreigner's right, but of the right of the injured subject. If it be the foreigner that invokes the criminal law, it is but just that the subject's duty should be measured by the law of his own state. The foreigner is justly excluded from public functions, to prevent their exercise being prejudiced by the claims of another state.

The same principle marks the limitation to the foreigner's rights in private law. When that exercise would infringe on the provisions which affect the public order of the state, justice requires that these rights be restrained.

The conclusion to which these considerations lead us is, that in view of the international duty of the state to administer justice to the foreigner, and subject to the paramount claims of the public order of the state, the extra-territorial application of foreign private law, whenever juristically necessary for the conservation of the foreigner's rights, is a duty of perfect obligation, binding on the state under international law.

In the words of the resolution of the Institut de Droit International, unanimously adopted in Geneva in 1874 on the proposition of Mancini, 'L'admission des étrangers à la jouissance des droits civils et l'application des lois étrangères aux rapports de droit qui en

[1] Sir H. Maine, International Law, 26.

dépendent ne pourraient être la conséquence d'une simple courtoisie et bienséance (comitas gentium), mais la reconnaissance et le respect de ces droits de la part de tous les états doivent être considérés comme un devoir de justice internationale [1].'

It is, in truth, a denial of justice to refuse to apply foreign law to foreign legal relations, when that is the proper law to apply from a juristic standpoint. Von Bar points out how often the unvarying application of the law of the tribunal, taken in conjunction with the modern usage of equality of foreigners and citizens before the law, amounts to a simple refusal of legal rights to foreigners [2]. As Sir Robert Phillimore forcibly expresses it, 'It is a triumph of barbarity when a municipal law is applied to a foreign legal relation or right instead of the law which from the nature and reason of the thing ought to govern it [3].' It is certainly a startling proposition—one could not believe it possible to be made but that one reads it—that although by the strictest international right a foreigner is entitled to access to our tribunals, all he is entitled to receive, when he gets there, is the application of a local law, which in his case works acknowledged injustice. What else is the meaning of the absurd formula that courts have a right, if they think fit, to apply the *lex fori* to all cases? If right means might, possibly, though not probably, they possess it; in which case the proposition is resolvable into the lawless statement that because the state has physical power to disregard international law, its courts may rightfully ignore that law. But if right means legal right under the law of nations, neither the courts nor the state which creates them can have any such monstrous right to do international wrong.

The absurdity of the position becomes clearer the more closely it is investigated. It is never primarily foreign law which is applied; it is the right of a foreigner, or a right acquired abroad, which is recognised.

If it be a foreigner's right which is in question—wherever acquired—his membership of a State of the Family of Nations, his capacity for acquiring rights, not to say his very existence, are facts which have arisen under the protection of his own law; and that law must be recognised in some at least of its consequences whenever the foreigner is dealt with by any court as a person capable of rights and liable to duties.

If it be a right arising abroad which is before the court, the foreign law must be recognised as that ruling where the right came into being. Otherwise no legal right can be in existence at all to which to apply the *lex fori*. But it may be said—those who made

[1] Mancini, Rapport, R. D. I. loc. cit.
[2] Bar, 1889, sec. 1; and see his criticism of Pfeiffer. [3] Phillimore, iii. 2, 3.

the first proposition are capable of making any other—that the tribunal may recognise the foreign law to the extent of conceding the validity of the origin of the status or the right under its sanction, but that the *lex fori* will or may be applied to the incidents of their continued existence. To this be it sufficient to reply that the symmetry of the original proposition was its chief recommendation; it is clear that the *lex fori* cannot be applied with completeness. Wherever a foreigner's right, or a right arising abroad, comes before the court, foreign law must, however grudgingly and haltingly, be recognised.

The proposition becomes still more absurd when the question is of rights, which if arising at all, have not arisen under foreign but under municipal law, and the existence of which depends on the intention of the parties who have expressly referred to foreign law. In this case, too, is the *lex fori* to be applied? Will the court, which regulates its procedure on such remarkable principles, refuse to look at foreign law, and so render itself incapable of adjudicating? Or will it, by an unworthy subterfuge, pretend that it is by the *lex fori* that it applies foreign law?—a device which shifting the responsibility at will from the court to the state, would cover all possible cases of such application, including those already referred to.

It is obvious that these perverse fictions, if carried or attempted to be carried into practice, would cause the state which adopted or permitted its courts to adopt them, to incur the penalties denounced by the law of nations against 'Justice administered partially, and in a different manner to the foreigner than to the subject, or with a denial or omission of any of the incidents necessary for ascertaining the truth.' In the words of Lord Stowell 'Neither a British Act of Parliament, nor any commission founded on it, can affect any right or interest of foreigners, unless they are founded on principles and impose regulations that are consistent with the law of nations[1].'

The International Jurists and Private International Law.

The existence of the duty of the state being established it is clear that no arbitrary line can be drawn, as some have attempted to draw it, acknowledging on the one hand the authority of the great writers on international law, when treating of the duties of states as regards states's interests, and illogically denying that authority when it treats of the duties of states as regards the interests of subjects in the territories of each other.

The distinction exists merely in the minds of certain writers on law. It is not traceable in the action of the tribunals, of the legislatures, of the executives of the civilized world.

[1] Lord Stowell, 'The Louis,' 2 Dod.

The inquiry—Is there a private international law? may easily be paralleled by the inquiry—Is there a law of nations? Is there any law which rests on custom? Those who do not consider it just that the peaceful relations and the future happiness of the league of nations should be the plaything of legal 'analysts' will consider the reply of Savigny sufficient. The common belief that it exists and the common effort to define its principles are conclusive proofs of its existence. The so-called realism can see nothing in law but parchments. Law to the clearer vision of the great jurist is seen to reside in the minds of the people—and is of the spirit, impalpable [1]. As that English jurist and Indian administrator, who in his time did so much to elevate the standard of juristic discussion, has warned us, a serious error as to human nature is becoming common in our day. Law is not obeyed through any cause so much as habit of mind [2].

The principles of private international law have been recently adopted in many treaties concluded between Continental states. Continental tribunals have, in some cases, even proceeded, perhaps not very judiciously, to enforce them by retorsion.

The Imperial Parliament has distinctly adopted the fundamental basis of the system—that the relations of individuals in the territories of foreign states are a subject for international treaty or convention and therefore of international law. The government is authorised to conclude such conventions with foreign states by an Act of the present reign [3]. Furthermore, Parliament by a similar statute, authorising like conventions, has imposed on our tribunals the duty of deciding, whenever foreign law is properly applicable to the legal relation before it, whether it will ascertain the foreign law by request addressed to the foreign tribunal [4].

The uniform judicial acceptance by our courts of the system elaborated by the jurists—subject only to their duty under municipal statute which sometimes compels them to reluctantly disregard that system—is well known. From Story to Laurent foreign writers have noted especially that current of judicial law. English courts refuse to enforce foreign judgments passed in violation of private international law [5], a view of which judicial notice has been taken by the German Imperial Court [6].

[1] Savigny, System, viii. 348; i. 7.
[2] Maine, I. L. 50.
[3] 24 & 25 Vic. c. 121 (Domicil).
[4] 24 & 25 Vic. c. 11.
[5] *Schibsby* v. *Westenholz*, 1870 (Art. 14 of Code Civil, see on Limits of Jurisdiction), L. R. 6 Q. B. 155; *Castrique* v. *Imrie*, 1870, L. R. 4 H. L. 414 (Jurisdiction); *Simpson* v. *Fogo*, 32 L. J. Ch. (Lord Hatherly on Foreign Court refusing to extra-territorially apply proper law); Story 618 a, Same; Westlake.
[6] Judgment of German Reichsgericht, 1883 (noting that English courts inquire if foreign judgment violates rules of international law, especially as to the extra-territorial application of English law); Piggott, 470.

One significant fact is to be remembered. The only distinct judicial challenge of the authority of the jurists which emanated from the English bench was promptly reversed by Act of Parliament—the Territorial Waters Jurisdiction Act, 1878. This Act has been judicially described as a legislative declaration that the opinion of the minority of the court was correct [1].

In considering the obligatory force of the system of private international law, it is necessary in practice to draw a clear line between two closely related questions—the duty of the state under the law of nations, and the duty of the judge under English law.

The duty of our judges is clear. To a servant of the state, 'Stadtrecht bricht Landrecht, Landrecht bricht gemeines Recht.' The English judge is bound to look in the first instance to English statute and English authoritative judicial decision. If they are silent, he consults the writings of the jurists. If on some minor points there is no preponderance of authority, he decides on general principles of international justice as it appears to him.

The duty of the state falls under a different category. Neither English statute or English decision can throw any shield over the action of our state as regards its obligations under international law. As in the sphere of public international law, so in the sphere of private international law, the system elaborated by the jurists marks the limits and the direction of the duty of the state.

As yet there has been evolved no *loi des citations*, but the obvious and ever-narrowing field for the *arbitrium* of the state and for the undefined duty of international justice, can only be found in those exceptional cases where there is a serious divergence of authority.

There are like points of doubt and divergence in the system of public international law, the binding force of which on states is unquestioned. Neither in the one system nor in the other does the existence of these questions prevent public international law from defining the duties of the state towards the foreign state, and private international law from tracing the state's duty towards the stranger within its gates—the foreigner within its territory.

Recognition of the International Character of Private International Law.

It is a distinct drawback to the advance of juristic science in England that any theory, so plainly at variance with the facts, as that which denies the existence of international obligation, should be accepted, however perfunctorily, as good enough to do duty in this

[1] Cockburn C.J. in *R.* v. *Keyn*, 2 Ex. D. 63 (challenging authority of jurists to extend English territorial jurisdiction); Lord Coleridge, *contra*. Two members of the majority thought the jurisdiction existed but only for international purposes.

branch of law. It is universally admitted that the rights of the neutral subject in the territory of the belligerent are properly a matter of state obligation and international law. But we are soberly assured, the rights of the foreigner under private law—that is to say, substantially all the rights which arise from the jural relations of daily life in peace, are a matter with which his state is not concerned. One writer's view, unintelligible to foreigners who know not Austin, appears to be that rights of any kind of an individual against a state would be anarchical if they were not impossible.

It is undoubtedly true that our national repute, not merely for juristic soundness, but for good sense and good feeling, suffers from a supposed prevalence of anti-social theory. Laurent, a writer of established reputation, speaking of the doctrine of comity accepted in England and America, observes:—'Leurs principes conduisent à ces excès d'un égoïsme aussi inintelligent que brutal' (D. C. I. 1, 565).

An eminent English writer refers to the term 'Private International Law,' as one to be treated with 'mépris mérité.'

'Mépris mérité,' observes M. Rolin-Jaequemyns (R. D. I. 1891, p. 98) 'est peut-être un peu dur.' Let us hope, on our side, that 'égoïsme brutal' is somewhat undeserved.

The merely verbal reserves of American independence or of Austinian analysis may be taken too seriously.

As I have shown, putting aside the theories of our writers, there has been no shadow of denial of the international character of the subject from the public organs of the state.

The contrast indeed would be ludicrous, if it were not disturbing, between the impression produced by theory and that which should spring from our national practice. This state in which freedom is an ancient inheritance has, more than any other in the circle of nations, thrown wide its doors with a hospitality, if anything, too lavish, to the oppressed of all lands. No foreigner need appeal for protection to his state—for the reason that no injustice is done him. Here, on the contrary, he fled from oppression at home. The time is not so far distant when the personal statute of the foreigner in England was a *universitas juris* of unfavourable privileges which he was glad to shake off. The civilly dead, the proscribed refugee, flying from religious persecution or political slavery, felt no desire to invoke his personal law, which recognised his existence but to menace it. I have referred to the causes which have led to the obscuring of the foreigner's right to the application of his law. In England, at least, the greatest cause has been, that in this land of ordered freedom, the personal statute of the slave was anomalous.

From the earliest to the latest period in the history of our law that tendency is manifest. The security of the foreigner in the territory is an article of Magna Charta. We were the first under the law of nations to recognise the extra-territorial validity of foreign decrees, limited only by our protection to the foreigner. At the present moment, we entertain suits between foreigners alone, a practice which the French Republic refuses to adopt. The foreigner is subject to no irksome registration, to no police supervision, to no special tax; he can enter the territory without passport or permission.

If we compare the foreigner's position here with his status in the Continental states, the contrast is startling indeed, but it is entirely in our favour.

The greater is the reason that our juristic theories should be brought into harmony with our national policy.

M. J. FARRELLY.

THE BAR AND THE CIRCUITS.

AMIDST the many changes that have been proposed in connection with the circuit system, I have sometimes wondered that no one has suggested that the division of the bar into circuits should be abolished. I venture to say that such a step would be in the highest degree advantageous both to the profession and to the country. At the present time England and Wales are divided into eight circuits. Every barrister who desires to practise out of London has to join one or other of these eight circuits, and has to do so within two years of his call. After joining his circuit, he is allowed two further years, in which to change his mind. Within that period he is at liberty to abandon his first circuit and apply for admittance to another. After joining his second circuit, he is irrevocably bound and can make no further change. Formerly a barrister was allowed to change his circuit as long as he was a junior, and it is even recorded of Sir Alexander Wedderburn (afterwards Lord Chancellor and Earl of Rosslyn), that he joined the Northern circuit after he had taken silk [1]. In these days however the change must be made within four years of call. For various reasons very few members of the bar take advantage of the right of change. The members of a circuit are under no obligation to admit a counsel who has already been a member of another circuit, and they sometimes refuse to do so. Moreover, people are apt to think and speak of a man who makes a change as having been a 'failure' on his first circuit, and this is an imputation which few care to incur. As things at present exist, therefore, every young barrister at the beginning of his career enters into a sort of covenant in restraint of trade, by which he binds himself to practise on one circuit only and on no other. It is true that a member of one circuit may conduct a case on another circuit, if he gets a special fee, but as special fees rarely fall to the lot of juniors, this slight relaxation of the rule may be dismissed from consideration. If a counsel practises on any circuit other than that to which he belongs he is practically boycotted by the members of that circuit, and is not allowed to join the mess. There is no legal rule preventing a counsel from practising anywhere he pleases. A judge, for example, cannot refuse to hear a counsel because he is not a member of the circuit on which he is practising. But the penalty

[1] Campbell's Lives of the Chancellors, vi. 61.

of exclusion from the bar mess is sufficient to deter any man of spirit or honour from attempting to practise elsewhere than on the circuit to which he belongs.

The rule that a counsel must confine himself to one circuit is, of course, the result of the ancient circuit system. In former days, when railways and hotels were unknown, when communication between different parts of the country was very much more difficult and rare than it is now, judges, counsel and attendants all travelled the circuit together. In some parts of the country, indeed, they were compelled to do so for mutual protection. Previous to the beginning of the eighteenth century not only counsel, but judges also confined themselves to one circuit. Lord Chief Justice King was the first to break through this rule, and his example was soon followed by all the judges [1]. Counsel, however, continued to confine themselves to one circuit and what was originally a custom, adopted on account of its convenience, hardened in course of time into a binding rule. Is it right that this rule, confining counsel to one circuit, should continue to obtain? The rule worked no hardship at a time when the difficulties of travelling rendered it practically impossible for a counsel to practise on more than one circuit. In these days of railways and telegraphs, when a journey from London to Carlisle takes less than seven hours, the rule does work hardship. To those unconnected with the bar, it seems monstrous that a member of the South-eastern circuit can only practise in London, and some second-rate South-eastern towns of no commercial importance, and that a member of the Western circuit is confined to London and a few towns in the West, where with the exception of Bristol there is almost no legal business at all. I have no hesitation in saying that such a rule as this is *prima facie* bad. It lies on those who advocate the maintenance of such a rule to bring forward good reasons for upholding it.

It is said that it is fairer to counsel themselves. The tendency of this rule, it is said, is to make merit rather than influence the criterion of success. It compels a man with legal influence on two circuits to choose between the two, and thus prevents him obtaining an undue advantage. My answer to this is that all ideas of fairness have been ruined by the growth of local bars. Within the last few years local bars have grown up in the various large commercial centres throughout the country. The local counsel, who are often men who have been solicitors or have passed through solicitors' offices, reside in one of the large towns in the circuit to which they belong, and confine themselves to practising on that circuit. The result of their being always on the spot is that they secure

[1] Campbell's Lives of the Chancellors, iv. 599.

a monopoly of the legal business. The old restrictions of etiquette have disappeared. Lord Campbell tells us that in his time, a counsel when on circuit was not even allowed to dine with an attorney or to dance with an attorney's daughter[1]. The growth of local bars has done away with all ideas of this kind. As these local bars increase in numbers, London men find it more and more difficult to obtain a footing in the provinces. When advocates of the rule urge in justification of it, that it is fairer to counsel themselves by putting them on an equality, they forget that this argument presupposes that all the members of the bar reside in London. This has ceased to be the case and consequently the reason loses its force. In order to compensate London men for the undue advantages enjoyed by locals in this respect, all the circuits should be thrown open to them.

Another reason that is sometimes given for upholding the present system is that litigants in remote towns are able to obtain the services of capable counsel, whereas if the present system were abolished, counsel might neglect the remoter towns and clients would thus be placed at a disadvantage. This reason might well have been urged a century ago, but it surely cannot be urged now. Competition is far too keen to allow of any part of the kingdom suffering from neglect of this kind. In these days litigants in the most distant parts of the country can obtain capable counsel whenever they desire them. In Scotland, where there are no local bars, counsel are allowed to go to any part of the country. Although the country is portioned out into circuits, counsel are not compelled, as in England, to confine themselves to one circuit. They are at liberty to go anywhere. I have never heard that the remoter parts of Scotland suffer from any want of capable advocates.

The rule was justifiable, in a time when railways and telegraphs were unknown, when the whole bar resided in London, when practice on more than one circuit was practically impossible, but in these days of free competition and rapid communication, the rule has ceased to have any *raison d'être*. I do not desire in these remarks to say one word against the rules of etiquette which prevail at the bar, and which are absolutely necessary to keep up the self-respect and dignity of the profession. I simply venture to suggest that the division of the bar into circuits is an arrangement which may have been justifiable once, but which is now antiquated and out of date, and which might well be abolished with other anomalies connected with the Circuit System.

J. A. Lovat-Fraser.

[1] Campbell's Lives of the Chancellors, vi. 56.

THE CASE OF *DAVID* v. *SABIN*.

SINCE nearly every deed dealing with real estate, nowadays, contains the words implying covenants for title under the Conveyancing Act, the construction of the implied covenants is a matter of the most general interest and of the greatest importance. The curious case of *David* v. *Sabin*, '93, 1 Ch. 523, is one of the first cases to throw light on the meaning of the obscurely-worded covenant implied by a conveyance as beneficial owner under sect. 7, sub-sect. 1 of the Act. Perhaps, having regard to the fact that the case occasioned 'much consideration and some fluctuation of view' in the Court of Appeal, and that they finally differed from the learned Judge in the Court below, it may be permissible to put briefly and with great deference a few reasons for thinking that the conclusion arrived at in the Superior Court was not the right one.

The facts of the case lie in the proverbial nutshell. The defendant Sabin in June, 1885, being tenant for life of certain property, granted a ninety-nine years' lease to one Baylis. In 1887 Sabin bought back the term for value, and obtained a surrender of it as beneficial owner from Baylis. He subsequently conveyed the property as beneficial owner to Baylis in fee. Baylis then conveyed to one Bryant, and Bryant to the plaintiff David. It was then discovered for the first time that Baylis had in fact in July and November, 1885, mortgaged the land by sub-demise, and fraudulently concealed the mortgages. The term which Sabin thought he had bought back amounted in fact only to a three days' reversion. The mortgages remained a valid and serious incumbrance. The plaintiff accordingly sued Sabin on the covenants implied in the latter's conveyance in fee to Baylis. Sabin, it will be observed, would have had a good defence against Baylis himself arising from the latter's fraud: but a defence of this nature was of no assistance as against the plaintiff who had purchased without notice of the fraud, and it was so held by the Court of Appeal in a part of their judgment to which it is not proposed in the following remarks to make any further reference.

The main question that arose in the case was the apparently simple one—had Sabin covenanted against the incumbrances which Baylis had secretly created? On the one hand it will be observed that Sabin had himself created the term out of which the incum-

brances were carved: on the other, he had bought back the term for value prior to his conveyance in fee to Baylis. Now the covenant in the Conveyancing Act begins thus:—'That, notwithstanding anything by the person who so conveys, or anyone through whom he derives title otherwise than by purchase for value made, done, executed, or knowingly suffered, the person who so conveys has, &c.' It was decided in the first Court by Romer J., and admitted on all hands in the Court of Appeal that these preliminary words must be taken to control all the separate covenants contained in sub-sec. (1) A. of section 7 of the Act. In other words, the covenants for right to convey, for quiet enjoyment, freedom from incumbrances and for further assurance are not 'four separate and distinct covenants, but parts of one entire covenant beginning with and controlled throughout by the words' in question.

This, however, did not conclude the matter, for it was pointed out that the disjunctive 'or' in the qualifying words showed that one portion of the words could be separated from the other. The covenant can, therefore (omitting inapplicable or unnecessary parts), be read thus:—'That, notwithstanding anything done, executed or knowingly omitted by Sabin, the subject-matter should be quietly enjoyed by Baylis and any person deriving title under him without any lawful interruption by anyone rightfully claiming through or under Sabin[1].'

It was accordingly urged for the plaintiff that the term created by Sabin was something 'done by him,' and further, that the interruption was by someone rightfully claiming through that term, i.e. claiming through or under Sabin. The Court of Appeal took this view of the case. 'What the defendant has "done" was to part with the term and the right to possession.' 'The continued existence of the right to the possession of the land constitutes a defect in Sabin's title, and it is a defect of his own creation arising from an act done by himself.' And they also held that the incumbrancers were persons claiming through or under Sabin.

One of the commonest, and often one of the most useful methods of attacking what is believed to be an unsound conclusion, is to put a case resting on the same arguments but leading to a result altogether obnoxious to human reason. This method was adopted in *David* v. *Sabin*. Take the case of a young man selling his estate in fee and then buying it back after fifty years after many dealings with it in the intervals by the owners for the time being. If he or his heir then sold the estate as beneficial owner, would he or the

[1] The covenant for quiet enjoyment is taken as most applicable to the case, and as that on which the plaintiff sued: but the argument applies equally to all the covenants.

heir be held liable on the covenant for all the acts of the owners of the estate during the fifty years? Romer J., who put this case, said that he was unwilling to give a judgment which would lead to such a result. It appears that Lindley and Smith L.JJ. would also have been driven to the same conclusion, had it not been that they thought they could distinguish the case put by Romer J. 'This is not a case,' said Lindley L.J., 'in which a vendor creates an incumbrance, then sells the fee, then repurchases and afterwards sells again with the ordinary covenant for title. The covenant by a vendor in fee is not understood as extending to acts done previously to the last preceding sale. On each sale the title is investigated, and conveyancers are content with a series of covenants for title, each of which covers the time which has elapsed since the last covenant from a vendor in fee.' To which it may be replied that, whatever their aspirations may be, conveyancers must also be 'content' with an ordinary conveyance with proper covenants from the vendor, whether there are prior covenants or not: and it is difficult to see how the absence or presence of covenants in prior conveyances can affect the construction of the vendor's covenants. But the distinction drawn by Smith L.J. was a different one. 'The present case is not the case of a man selling his estate out and out and afterwards repurchasing it, it having been dealt with by others in the meantime—in which case, I agree, the covenants would not apply; but it is the case of a man who, whilst he is the owner of an estate in fee, carves out of it a term, retaining the reversion expectant upon the determination of that term in himself, and then conveying as beneficial owner in fee with the term created by him still outstanding. It seems to me, with deference to the great experience of my brother Romer in these matters, that the case put by him is not in point, for in the one case the vendor, whilst retaining possession of the estate, has done nothing to incapacitate himself from conveying the fee, whilst in the other he has.' According to the one view then in construing the covenant you must not go back past the last sale of the fee: according to the other, the question is whether the vendor, whilst retaining the legal seisin, has done anything to incapacitate himself from conveying the estate in fee. It is submitted that the very strongest reason for thinking that neither of these views is correct, is to be found in the fact that the very covenant under consideration applies to leaseholds as much as to freeholds. Why should the words 'done by him' in the same covenant have one meaning when the vendor is selling a term, and another when he is selling the fee? But even if you consent to import words into the covenant varying with the subject-matter, you are left with the result

that, if Sabin had conveyed the term as beneficial owner and the reversion as beneficial owner, he would not have been liable; but, because he conveyed the two together he is liable—which is certainly unsatisfactory. Moreover, the anomalies which the construction gives rise to are almost endless. For instance, if a vendor creates a long term of 300 years with a peppercorn rent and fifty years after repurchases the term, and subsequently sells the fee as beneficial owner, he will be liable for all intermediate dealings with the property: but if on the other hand the lessee under section 65 of the Conveyancing Act enlarges his term into a fee simple, then the vendor, if he repurchases and sells a beneficial owner, will not be liable on the covenant according to one view, but will be liable according to the other. Or again, suppose the vendor creates a long term, subsequently repurchases it, and then desires to sell again. If he sells the fee as beneficial owner he is liable for intermediate dealings by his lessee: but if he sells the term and the purchaser enlarges it by the same deed (as is often, rightly or wrongly, done) he escapes liability. To take another example, suppose that Sabin after creating the term had parted with the reversion as well, that the lessee had then created and concealed an incumbrance, and that the lease and reversion had become joined in a single owner who had conveyed the fee to Sabin. Would Sabin then have been liable on his covenant as beneficial owner for the incumbrance created by the lessee? If the test is to be acts done subsequent to the last sale, he would not have been liable; if the test is ownership of the reversion by Sabin, then he would be liable. It is submitted that a consideration of these instances and the reasons that underlie them, must lead to the conclusion that there is no logical halfway-house such as is suggested by the learned judges. It is impossible to draw any valid distinction between the sale of a term and the sale of the fee for the purpose of the covenant as beneficial owner. The case suggested in the Court of first instance is parallel in all respects to Sabin's case, and it is not logically possible to decide the two in different ways. If, then, the parallel case leads to a result which the mind rejects as unsound, the conclusion must be that a narrower construction must be put upon the words 'notwithstanding anything, by the person who conveys, done, executed, or knowingly suffered.'

The first thing to be noted in this connection is the enormous extent of the covenant if made by a vendor, who is also unfortunately a former owner of the property. His covenant seems to amount, if the decision in *David* v. *Sabin* is correct, to little less than an absolute warranty: for—applying the same reasoning—the vendor by his first conveyance (whether in fee or for years)

parted with the right to possession, and the continued existence of the right to possession in any person claiming through the first conveyance constitutes a defect in the title arising from an act done by the vendor himself. It will be observed that this amounts to an absolute warranty for everything made, done, executed, or omitted since the date when the vendor first acquired the property —a covenant which, it is presumed, no wise man would dream of entering into.

This leads us to the anomaly referred to by Bowen L.J. 'If the defendant had never had any interest in the land before he acquired the term from Baylis in 1887, he would not have been liable for the mischief arising from those prior incumbrances. Is the defendant, it will be asked, to be in a worse position because he had possessed the fee or the term, and since then parted with it in 1885 for a time to a person who defrauded him? Why, it will be said, is he to bear the burden of the fraud of another person in one case more than in the other? The answer seems to me to be that the Legislature has so chosen to enact.' It may, perhaps, be admitted that if covenants for title had been the invention of the Legislature and had been first introduced to an admiring public by the Conveyancing Act, and had been made compulsory in that Act, then the literal construction adopted by the Court of Appeal would have been correct. But, after all, covenants for title are ancient history, and the principles to be adopted in their construction have been repeatedly laid down. The object of the Legislature was not to alter covenants, but to shorten conveyancing. The Act did so by taking the usual covenants almost verbatim from the Precedent Books, and enacting that those covenants should 'be deemed to be included' on the use of certain words. It would be a strong thing to hold that the covenants thus 'deemed to be included' are to be construed in a different manner to covenants in identical terms copied out in full in the deed. It is very clear, however, that covenants for title have never been construed by the Court with the rigidity of Acts of Parliament. In the one case it is difficult to depart from the letter of the Statute: in the other the intention of the parties is the light by which the document is to be construed. Thus it is a mere commonplace of construction of covenants for title to hold that restrictive words occurring in one covenant control the generality of another covenant, if that appears to be the intention of the parties[1]. 'The Court will endeavour to ascertain the intention of the parties from an attentive consideration of the whole deed, and construe the covenants either as independent or as restrictive of each other, according to such apparent inten-

[1] See Elphinstone on Deeds, chap. 30 passim.

tion[1].' 'Some things are extremely clear. In the construction of agreements and covenants, the intention of the parties is principally to be attended to. In conveyances of this sort, the usage of the profession deserves considerable attention. According to the ancient mode of conveyance deeds were confined to a very narrow compass. The words 'grant and enfeoff' amount to a general warranty in law and have the same force and effect. The covenants, therefore, which have been introduced in more modern times, if they have any use besides that of swallowing a quantity of parchment, are intended for the protection of the party conveying; and are introduced for the purpose of qualifying the general warranty which the old common law implied. This has been clearly settled ever since *Noke's* case (4 Co. Rep. 80). We do not do justice to the parties unless we look to the whole deed, and infer from that their real intention. Covenants being intended for the benefit of the party conveying, let us see how this defendant has protected himself[2].'

On these principles, what was the intention of the covenant contained in Sabin's conveyance to Baylis? In the first place it is tolerably clear that, in construing the covenant, it is not fair to pick out applicable words and leave out of consideration the rest of the covenant. Reading the covenant as a whole it is submitted that there is to be gathered from it a distinct intention to except from the covenants the acts of persons through whom Sabin claimed for value. Is it proper to strain the meaning of the words 'anything done by him' in order to make the covenant comprise acts done by persons through whom he claimed for value? The lease created by Sabin was not the *causa causans* of the defect of title. That defect was caused by Baylis who had purchased from Sabin. The next point is the great extent of the covenant as construed by the Court of Appeal. This has been already commented on. It may next be observed that it is tolerably clear on principle that Baylis could not on an open contract have insisted on a covenant covering the acts of persons claiming under Sabin's prior lease. The covenant must extend to the acts of prior owners up to and inclusive of the last purchaser for value, but not beyond. Now if a person buys a reversion at one date and the term which precedes it at another date, there have been two separate purchases for value; and the covenant on a sale should extend as regards the term up to the purchase of the term, and as regards the reversion up to the purchase of the reversion. Clearly a hard and fast rule that the covenant must extend in such a case up to the date of the

[1] 1 Saund. 60 n (*e*).
[2] *Browning* v. *Wright*, 5 R. R. 521, at p. 531, per Buller J.

purchase of the reversion would be wrong: for, altering the order of purchase, if a person buys a term at one date and subsequently buys the reversion, it would be monstrous for him to contend that his covenant on a sale is not to include acts done by him in regard to the term before he acquired the fee. 'The covenant,' to repeat the remark quoted above, 'is not understood as extending to acts done previously to the last preceding sale.' True: but the question in *David* v. *Sabin* is, what was the last preceding sale? The answer is to be found in the abstract of title, which would show the surrender of a lease for value and a prior purchase of a fee or of a reversion—that is to say, the sale to Sabin was made in two portions and at two different times. Read in this manner, the qualification of the learned Lord Justice does away with all anomalies and meets all the difficulties of the case.

It is submitted then that it is not proper to construe a covenant by a vendor who has been several times a purchaser as extending to acts done by him prior to his last purchase for value. His double personality, so to speak, is no argument in favour of an intention to be doubly liable. His covenants should be construed in the manner indicated by Lord Eldon as summarising the real meaning of the usual covenants for title by a vendor. 'In fact, the vendor says, "*I sell this land in the same plight as I received it, and not in any degree made worse by me*[1]."' That must mean, if he has purchased twice, 'in the same plight as I *last* received it.' 'If the defect in his title depend upon the acts of those who had the estate before him, and he honestly but ignorantly proposes to another person to stand in his situation, neither hardship or injustice can ensue.' That, it is submitted, is precisely in point. The defect in Sabin's title arose from the act of Baylis, after Sabin had parted with part of the property, namely, a term of years, by sale. And so far as abstract justice has anything to do with a case where the question is which of two innocent parties is to suffer for the fraud of a third, probably the majority of mankind would be of the opinion that an innocent vendor is more to be pitied, because a purchaser must always be aware of the possibility of risk; while nothing is less likely to enter the mind of an honest vendor.

F. H. Maugham.

[1] 5 R. R. p. 526.

ARCHAISM IN MODERN LAW[1].

LEGAL solemnities of all kinds are proverbially conservative. In ceremonial acts and observances, in necessary or accustomed modes of expression, in the 'common forms,' as we call them south of the Tweed, or 'juridical styles,' as I am learning to call them here, which embody so much learning, caution and experience of human affairs, in the very outward garb of judges and advocates, one may find, sometimes plainly stamped, sometimes half effaced, the marks of ideas and customs that have long ceased to exercise any practical influence. It would not be difficult to collect examples of this kind on either side of the Border. There are few departments of law where some stubborn bit of archaic form has not stood out, down to times within our own memory if not to this day, like a pile of ancient rock, weathered and denuded, but not yet worn down to the level of the plain where men dwell and work. One of our very commonest English forms, used by thousands of people of every condition and every degree of learning or ignorance, is the most venerable of all. The words, 'With this ring I thee wed,' take us back to the oldest Germanic laws and customs of which we know anything. The wedding-ring is not a mere symbol, it represents a vital condition of the contract. It is a *vadium*, a piece of a system in which there was yet no room for the more modern and subtle Roman doctrine of consent sufficing to form an agreement. Our Anglican marriage service dates, in all its essentials, from a time when a contract to be performed in even the proximate future could be secured, so to speak, only by an elaborate system of outworks in the way of surety and pledge[2]. Again, it is pleasing to compare the Northern *ultima ratio* against an obstinate denier of justice, whereby he was 'put to the horn' as the king's rebel, with the 'commission of rebellion,' which formed a part of the old English Chancery process. While these forms existed as part of ordinary practice it might still be said that there was something extraordinary and almost

[1] An address delivered before the Juridical Society of Glasgow in December 1892.
[2] See the Anglo-Saxon and later Continental forms appended to Sohm's Das Recht der Eheschliessung, Weimar, 1875.

mysterious about the king's justice. Besides the justice which was the common right of the subject, there was a power in reserve to overcome special obstacles and make an example of great offenders who trusted in their greatness to defy the law. When that horn of Scots justice was last really sounded I have not had time to learn, but its name brings before us the days when a whole jurisdiction lay within the compass of a horn-blast, needing no horn of Roland, but only such as the plain wayfarer might carry with him to proclaim himself an honest man and no roving cattle-thief. But, however tempting it might be to linger in this region of picturesque survivals, it is not exactly there that I shall invite you to spend this hour of professional diversion (for such are the diversions of lawyers), but among matters of antiquity that have entered more deeply into the substance of the law. Both in Scotland and in England we find inveterate archaisms either existing in rules of the law still in force, or having existed late enough to be set forth by the classical text-writers of the eighteenth century in the full light of their rationalizing method. In almost every case it is or has been sought to justify such rules by more or less ingenious reasons of justice or public policy which certainly have nothing to do with the historical origin of the rules, and little, if anything, to do with the fact of their persistence in modern times. Those who rightly perceived that reasons of this kind would not serve nowadays have been apt, on the other hand, to assume that there never were any other reasons. Our ancestors have accordingly been credited with all but miraculous foresight, and charged with barely credible stupidity. Blackstone made them out a little lower than the angels, Bentham little better than the beasts. In truth, I should conceive they were not much better or worse, wiser or more foolish, than we who have come after them, so far as natural ability and good intentions went. Like us, they were pressed with manifest evils of divers kinds, and applied such remedies as their skill and knowledge could devise. Like us, they deemed their burdens greater than those of any former generation, and their inventions more brilliant and beneficent. I need not remind you, the fellow-citizens of my learned friend Mr. Neilson, who has made the subject of Trial by Combat his own, that Glanvill, celebrating the provision of the Grand Assize as an alternative for the duel, is as proud as any modern popular reformer. Like us, in short, our mediaeval forefathers made laws and maintained justice as best they could, and when we consider how feeble were the powers in that behalf of any prince or commonwealth in Europe only a few centuries ago we shall be more disposed to wonder how they did so well than that they did

not do better. Being mortal, they made their share of mistakes. Like us, they sometimes found them out in time, and sometimes not. Now and again they lived and died in the belief that the worst of their well-meant blunders were their greatest triumphs, and cheerfully left posterity to mend or endure them. Probably they were not unlike us in this respect also, though, by the nature of the case, we shall not know it in this world.

Before we come to examples let us endeavour to realize something of the general features of early Teutonic law. Conceive yourselves, if you can, living in a society where courts are held and judgments given, but the fruits of judgment are left for the successful party to gather by his own efforts. 'Diligence' has not become in fact, any more than in name, a specific part of the order of public justice, and even the successful suitor must rely for the most part on his own diligence in the sense of that word which alone is recognized in common discourse. A man who wilfully and persistently refuses to do right to his neighbours or obey the dooms of the Court may be outlawed in the last resort, and dealt with as a public enemy. But great men and their followers will often take this risk rather than submit to an adverse judgment. In Iceland, indeed, we find at a comparatively late period that contending parties may take up arms and break from litigation into petty war at the seat of judgment itself. In Wessex, in Alfred's time, the pursuer of a lawful feud might lay siege to his adversary and deliver an assault if he held out after due warning. Law is not yet the active minister of justice, but rather a formalized voice of the popular conscience declaring to each man the point at which he may without blame use whatever power he has to do himself right. Form is not wanting, far from it. Procedure is elaborate and ceremonial almost in proportion as the direct authority of the tribunal is weak, and proof is as rigidly formal as anything else. Rules of evidence in the modern sense do not exist. It would seem, on the contrary, as if the ingenuity of early Teutonic sages had exhausted itself to avoid the responsibility of forming any opinion whatever on a matter of disputable fact. There is a prescribed way for a party to prove his case or to clear himself. If the fixed conditions are once satisfied, the proof is conclusive. It may well be that our ancestors of fifteen or eighteen centuries ago would not have accepted any merely human and individual judgment in matters of opinion and belief. It is said that their descendants in the north of England do not always accept the decision of the umpire at a football match. Perhaps the ancient Germans acquiesced in what seem to us arbitrary and barbarous methods of determining an issue, not because they

believed in them as guides to the truth[1] much more than we do, but because they could use no process that was not self-acting, and had no practical power of sifting facts. Perhaps the search after truth by any ordinary means of inquiry seemed to them too precarious and complex for the purpose of settling a judicial controversy where the result had to be made, above all, certain. At any rate there was no leading of evidence in the modern sense. Oath was not the warranty or sanction of a witness's account of facts, but an operative proceeding; it might be for the pursuer a necessary condition of his claim to be heard, for the defender (when multiplied by the proper number of oath-takers) a final and conclusive discharge. Most curious of all to modern eyes is the fact that the extreme technicality and rigidity of ancient laws is not the work of professional ingenuity; for there is not any legal profession. There are no trained judges, save so far as bishops and other clerkly persons in high places may have a tincture of Roman or Romanized learning; and as for advocates, there is so little thought of them as an established order that it is a matter of grave difficulty for any party to appear otherwise than in person.

What has just been stated is, to the best of my knowledge, a sober and unvarnished outline of such judicial institutions as were to be found in this island and the greater part of northern and western Europe about a thousand years ago. Now, let me turn (protesting, nevertheless, that I speak as a layman in Scots law) to the rules of criminal pleading in Scotland as late as the Restoration. I learn from a received text-book[2] that down to the year 1669 it was a principle of the Courts, evaded in practice only by shifts and fictions, that a defence contrary to the averment of the libel could not be allowed. An *alibi* was regarded as a kind of preliminary exception by the prisoner—panel, I should say—and at one time it was actually the practice to take the proof of this or any similar special defence before hearing the prosecutor. And this is Hume's explanation of the rule—'The notion of a conjunct probation of the libel and defences before the assize was thought too dangerous to be admitted. The prerogative of proving, and the choice of the witnesses, were to be assigned to one of the parties only; and on the evidence taken for him the issue must entirely depend.' I do not pretend to know the mediaeval history of the rule, and if I tried to investigate it with an English lawyer's imperfect knowledge and appreciation of Scottish authorities

[1] There are distinct indications that the Lombard princes would have abolished trial by battle if they could; and the ostensible reason for introducing it was the prevalence of perjury.

[2] Hume, Comm. ii. 297–8 (ed. 1843).

I should almost certainly go wrong in details, if not altogether. But, as the thing stands at a time little more than two centuries back, it is a most striking reproduction of the archaic doctrine of proof which was once common to all Germanic law. Proof and evidence are not contentions, not a process of eliciting the truth by examination and cross-examination from the various and perhaps conflicting accounts of witnesses; they are as much one-sided acts of the party as pleading. The party who can first put himself, so to speak, in possession of the Court is in the better plight; for the other has no chance of interrupting him, and if he carries his proof through according to the rules the Court is bound to give judgment for him. If he fails in any prescribed point the Court must equally give judgment against him without regard to the general merits. The whole cause is staked on the issue of the party's proof, just as down to a much later time, in England, it might be staked on the issue of a single point of pleading, remotely, or not all, connected with the real matter in difference. Quite in the spirit of this view we find that Hume expressly speaks of the *prerogative of proving*. A modern lawyer speaks of the *burden of proof*, and will be astute to find out as much as he can (which, in our latest English procedure, is perhaps more than he ought) of the adversary's intended proofs before he enters upon his own. Here, then, in Scotland, long after the Courts had taken upon themselves to brave the perils of a serious endeavour to arrive at the truth of disputed facts, we have the ghost of the ancient formal and single proof not only walking but giving serious trouble.

An ingenious young lawyer, Mr. Salmond, of the New Zealand Bar, has lately pointed out[1] that even in the latest civil and criminal procedure of the common law the old Germanic notion of judicial proof has left its mark. Trial by jury was, in its beginnings, only one possible mode of proof, and, like all archaic modes of proof, it was conclusive. To this day the verdict of a jury cannot in strictness be appealed from. I speak only of English practice, as that in which the functions of the jury have been most fully preserved. In criminal justice, where archaism is even more persistent than on the civil side, there is no remedy by regular process of law, but only through the pardoning power of the Crown, against a wrong verdict of guilty, and none at all against a wrong verdict of not guilty. The same rule prevailed for centuries in civil causes also, and was evaded first by devices of pleading intended to multiply questions of law for the Court,

[1] Essays in Jurisprudence and Legal History, by John W. Salmond. London, 1891.

and leave as little as possible for the jury, and later by the method of ordering a new trial. The judges would not take upon themselves to reverse or annul a verdict which they thought perverse or due to a wrong direction given in matter of law by the presiding judge, but they could and would refuse to give effect by the final judgment of the Court to such a verdict. They remitted the case for a new trial, and awaited the result of the whole operation being repeated with another jury. The parties might be saddled with huge delay and expense, but the sanctity of a verdict remained, in the letter, inviolate. At last, under the boldly innovating system of our Judicature Acts, the Court of Appeal has a discretion, though not an unlimited discretion, to give the final judgment which it thinks ought to have been given in place of ordering a new trial [1].

Again, there is one form of proof or evidence in constant use on both sides of the Border which bears pretty plain marks of its antiquity—I mean the deed or charter. It is not of Germanic origin; indeed, it is clerkly and Roman. Strictly speaking, it is as much an exotic as the methods of your Consistorial Court or our Court of Chancery. But it came in early, and had to be fitted into Germanic procedure while ideas of procedure were still rigid. The charter found its place accordingly as a mode of proof; and it was conclusive, not because it was a specially solemn or considered expression of the party's will, but because degrees of probative force were not recognized, and if admitted at all, it could be nothing else than conclusive. In the time of Glanvill, and of the 'Regiam Maiestatem' which attests that down to the thirteenth century English and Scots law had not diverged from their common Anglo-Norman stock, writing and battle, *scriptum vel duellum*, are the two recognized final modes of determining an issue in the King's Court. A deed is not conclusive nowadays, but it still retains peculiar qualities and virtues derived from its earlier history. In England its operation is a kind of standing protest against our modern theory of contract, with which it stubbornly refuses to be reconciled. In Scotland you have been more faithful to the archaic type than we have. With us the attestation of a deed is only matter of habitual prudence and convenience; with you it is a necessity. But when you have got a properly attested deed, I understand that in this kingdom it proves itself without external evidence, whereas in England we have so far forgotten our old lines of judicial thought as to treat the execution of a deed as a fact which, unless admitted, must be proved like any other

[1] R.S.C., O. 40, r. 10.

fact. On the other hand, we have stoutly retained the Anglo-Norman solemnity of the seal. It is true that the whole point of the seal in the twelfth or thirteenth century, and even later, was its individuality; so long as a man kept his seal carefully he was in no danger from forged grants. In modern times the seal has become an empty formalism, and its use has been generally dispensed with by statute in the American common law states and in our English-speaking colonies. Perhaps we have indirectly derived some good from writing not under seal being left, as a thing of no solemnity, to find its place as best it could among common and modern transactions. Our rules as to the relative value of written and oral evidence are quite rational and fairly simple.

On the other hand, we can boast of having preserved in English criminal law one of the very oldest pieces of Germanic procedure, transformed and recast in the great constructive period of the common law. The grand jury is still an indispensable part of our system, though now scarcely more than a ceremonial one. Sometimes, in the case of a vexatious or hastily undertaken prosecution, it saves an innocent person the pain of a public trial. On rare occasions it may assume a semi-political office and ease off impending friction between the law and public opinion. I well remember one such occasion in 1867, after the Jamaica riots, when certain officers were indicted for murder in trying and capitally convicting the supposed leader of the rebellion under colour of martial law without any regular jurisdiction either civil or military, and on evidence which a Court of law could not have received. The late Lord Chief Justice Cockburn expounded the law to the grand jury with much learning and eloquence, and strongly in favour of finding a true bill. I heard the charge, and very impressive it was, though perhaps the Chief Justice's style and manner were open to the criticism that they were more forensic than judicial. In point of law I believe he was right. But the grand jury threw out the bill, and in point of fact I believe they were right too, for such was the prevalent public feeling, whether right or wrong, that a petty jury would certainly not have convicted, and the trial would only have prolonged a bitter controversy without vindicating any principle of justice. As a rule, however, the grand jury looks nowadays rather like a fifth wheel on the coach, and grave and learned persons have in the course of late years proposed more than once or twice to abolish it. For my own part I am inclined to think that such a measure would do no real good, would do some, though not much, harm, and would offend a far greater number of people than it pleased. At all

events one would be sorry to lose, without strong reasons, so venerable a link with antiquity. For the grand jury may be said to represent, in substance, though hardly by direct succession, that accusation by the common report of the country which in the early Germanic plan of criminal justice was no mere ornament or safeguard, but a mainspring of the machine. Among the ordinances made at Wantage in Berkshire by Æthelred and his Witan for the northern parts of England, nearly nine hundred years ago, we find this provision—'Let a Court be held in every wapentake, and let the twelve eldest thanes go out, and the reeve with them, and swear upon the halidome put into their hands that they shall accuse no innocent man, nor conceal no guilty[1].' Now these twelve thanes are certainly different in many ways from what we now understand by a grand jury. The grand inquest representing the body of a county seems to date only from the fourteenth century. These twelve men represent a wapentake (as the jury of accusation under the Assize of Clarendon represented the hundred long afterwards), and it is by no means clear that the law and procedure of the ordinance in which they are mentioned is not Danish rather than English. Still, it may not be an idle curiosity to compare the oath prescribed to them with that which I have myself administered on Circuit as judge's marshal, 'You, as foreman of this grand inquest for our Sovereign Lady the Queen and the body of this county, shall diligently inquire and true presentment make of all such things as shall be given to you in charge or *otherwise come to your notice* touching this present service.' Thus it is contemplated as possible that the grand jury may present offenders of their own knowledge as well as indict them upon the prosecution of some person, and in law there is certainly nothing to prevent them from doing so, though it has long been out of use. The form goes on, 'The Queen's counsel, your fellows', and your own, you shall observe and keep secret. You shall present no man for envy, hatred, or malice, neither shall you leave any one unpresented for fear, favour, affection, gain, or reward.' This is really nothing else in substance than an amplification of the oath appointed for those twelve eldest thanes in the dooms of Æthelred. But what is still more curious is that the ampler form is really the older, for in a Rhenish ecclesiastical manual of the early tenth century we find, in a procedure evidently modelled on the Frankish royal inquests, that the jurors (so expressly called, it appears, for the first time) are sworn to conceal

[1] Æthelr. iii. 3, Schmid, Ges. der Angels. p. 212, cf. the plaintiff's oath in Anh. x. 41, p. 406, and the witness's oath (13th cent.) in The Court Baron (Selden Soc.), p. 77.

nothing from the bishop or his commissioner, '*nec propter amorem, nec propter timorem, nec propter praemium, nec propter parentelam*[1].' Mediaeval English forms are simpler, so far as they can be traced[2]. We find in Britton a clause that the jurors shall not omit their duty for any love, hatred, fear, gift, or promise[3]. In other forms there is only a promise to answer truly, and sometimes also to keep the King's counsel secret, of which 'the Queen's counsel, your fellows', and your own, you shall observe and keep secret' is the modern equivalent as I knew it. As late as 1649 the form given in a compilation called the Book of Oaths is very short and simple. The longer form, which I have given from memory, was certainly the current one on the Western Circuit a score of years ago. There is also, I believe, a shorter form in common use, containing, however, all the same points in substance. It would seem that the fuller form came in soon after the Restoration, for the language cannot well be much later. I confess myself at a loss, at present, to guess how and where it had been preserved, or from what custody it was produced, when its phrases were restored to English use after an interval of some centuries. Perhaps it was a piece of deliberate antiquarianism; we know that the later seventeenth century was an age of antiquaries. Probably enough different forms were used on different circuits, and possibly there may have been continuous precedents of the more amplified type in ecclesiastical proceedings. In any case we are sure of two things, and there is something to be learnt from both of them. Notwithstanding the singular resemblance of the oath of the Grand Inquest in its latest form, that to which I can myself bear witness, to the earliest English formula of a like sort, we cannot prove that the two are connected by any continuous history of English usage; the re-appearance of these Carolingian clauses would seem to be not a survival, but a revival or outcrop, which may or may not be capable of complete explanation. The second point is that this, like everything else about the jury system, does not belong to the old Germanic folk-law. With the early Westphalian example before us we can have no doubt that the form as well as the substance is due not to the untutored wisdom of folk-moots but

[1] Regino abb. Prumiensis de synod. causis, etc. ed. 1840, 207; Brunner, Schwurg. 463; also in Gengler, Germ. Rechtsdenkmäler, 773.

[2] Oaths of the twelve knights before justices in eyre, Bracton, fo. 116, Britton, i. 22 (see next note), and the formula, 'De sacramento ministrorum Regis' in Stat. of the Realm, i. 232.

[3] Book I, c. 3: 'Et puis jurent eux ensemble ovek ceux qe il averount esluz pur les plus suffisauntz, qe des chapitres qe liveré lour serrount en escrit leaument presenterount, et qe ceo pur nul amour ne pur nul haunge ne doute ne doun ne promesse ne lerrount, et qe il les privitez celerount, si lour ayde Deus et les Seyntz.'

to the ordinances of Frankish princes, advised by counsellors whose learning was not Teutonic but Latin. Yet what a pretty story of the fidelity of English custom to primitive Anglo-Saxon usage might we not have made with a little dexterous and almost pardonable omission! We should only have had to minimize the Danish features of the ordinances made at Wantage, to manipulate the thirteenth-century evidence, making the most of Britton and the least of the other books, and to treat the form printed in 1649 as a transient innovation of irreverent Commonwealth men. As for the most fatal piece of evidence, the Westphalian instructions for an Episcopal visitation, it is quite a new-fangled thing for English lawyers, even if they profess a taste for historical antiquities, to wander off to Rhineland monasteries and discover how much business-like writing was done in the so-called Dark Ages. We have now seen how dangerous it is to put one's trust in coincidences between things remote in time and place without verifying the intermediate links. Let us pass to another example.

Our petty jury, corresponding to your assize, has a more archaic appearance in one respect. We do not accept the verdict of a majority, though in a civil cause the parties can accept it by consent, as indeed they can dispense with a jury altogether, a thing which was sometimes done on circuit even before the Judicature Acts. The principle that in the proceedings of assemblies a vote passed by a majority is binding, in the absence of more special regulations, appears venerable to us nowadays. But it is by no means immemorial. We read in Prof. Kovalevsky's Modern Customs and Ancient Laws of Russia that 'the privilege enjoyed in our days by the majority was quite unknown to the primitive folk-motes.' The decisions of the early Slavonic meetings were required to be, or rather to seem, unanimous; 'in case of difference of opinion, the minority was forced to acquiesce in that of the majority unless it could succeed in persuading the majority that they were in the wrong.' Dissentients might be fined or even beaten. The dissenting juryman, I need not remind you, is one of the stock figures in the humours of modern English procedure. He has been immortalized by a born Scot of whom both kingdoms are proud, by one of the few who could ever boast of having conquered him, by no less a victor and reporter than Thomas Carlyle. Is he indeed the true lineal descendant of the stubborn Slav freeman who was reduced to unanimity by being beaten with rods or thrown over a bridge? One is tempted to say so. But we have here, it seems to me, only another example of the temptations that have to be resisted in the historical study of institutions; and perhaps the example is all the better for

occurring in a matter of no great importance in itself. To begin with, the jury is not a primitive or popular institution at all. It has nothing to do with a folk-moot, and it never became naturalized in the old local and popular courts. What is more, unanimity is not required in the grand jury, which is the older institution of the two. There is, indeed, an archaism in this matter, but an archaism of a different order; perhaps it is not less respectable in its way. We have to do with the sanctity of a particular number. Fixed numbers run through all customary laws, and, for some one or more of several possible reasons, we find twelve in special favour among our Germanic ancestors. Even duodecimal reckoning makes a certain place for itself in spite of the fact that we are born with only ten fingers. The long hundred of six score becomes an important factor in land measurement; it is the normal number of acres in the hide (if one will be content to accept the few precise and definite statements we have, rather than construct elaborate hypotheses from ambiguous data, and then reject the definite ones for not agreeing with these hypotheses). A man put to his oath constantly has to clear himself with the twelfth hand, that is, with eleven other men's oaths to back his own. So it came to be held, though not without hesitation and attempts to get an easier rule admitted, that in the oath of twelve men, and not less, a verdict should be established[1]. We know that people had no love for doing suit of court in the Middle Ages, and no more love for being jurors than they have now. The smallest acceptable number of jurors accordingly became the standard and only number in the petty jury from the first or almost from the first. Twelve men sufficed, but the verdict had to be the verdict of twelve, and therefore the twelve must be unanimous. And so they have to be to this day. The law discreetly knows nothing of the dialectic or other processes by which they become so[2].

Now I take up a specimen of a different kind. It is almost painfully familiar to us Southrons, but for you it may possibly have some little novelty. Thanks to the sages of the law who flourished in the reign of King Charles II, we live under a certain 'Act for prevention of Frauds and Perjuries,' commonly called the Statute of Frauds. It has been said that every line of it

[1] It was only in the first quarter of the 14th century that the necessity of the twelve concurring was taken for settled law (Thayer, The Jury and its Development, Harv. Law Rev. v. 296–7). The method originally prescribed for the Grand Assize (Glanv. ii. 17) of adding new jurors till an unanimous verdict of twelve was obtained does not seem to have been extended.

[2] See *Owen* v. *Warburton*, 1 Bos. & P. N. R. 326, 8 R. R. 817: 'The Court will not set aside a verdict upon the affidavit of a juryman that it was decided by lot.'

is worth a king's ransom; and it is certain that not a few lines of it have cost some such amount to successive generations of litigants during the two centuries for which it has been in force. According to the researches of the Historical Manuscripts Commission, to which the Dean of your Law Faculty here has lately drawn attention[1], the original idea was Lord Nottingham's, but Lord Guilford was chiefly answerable for the statute as it was passed. It does not seem to me to do that learned person much credit. Anyhow, I have always understood that you find life and business in Scotland pretty tolerable without the Statute of Frauds. One of the most important and constantly discussed clauses has to do with the sale of goods. A contract for the sale of goods to the value of ten pounds sterling or more is not 'allowed to be good' unless one of certain conditions is satisfied. The making of 'some note or memorandum in writeing of the said bargaine' is one of them; I have nothing to say of this at present. The others are as follows:—'Except the buyer shall accept part of the goods soe sold and actually receive the same or give some thing in earnest to bind the bargaine or in part of payment.' What is the effect of this? It is a piece of fairly modern legislation, framed by persons who probably knew something of Roman law, and almost certainly knew nothing of Anglo-Saxon or any other Germanic legal antiquities. Yet what it does is just to throw us back to the mediaeval Teutonic doctrine of sale, pretty much as we find it in Glanvill and Bracton. Indeed, the statement is not at all unlike Glanvill's. It expresses notions equally unlike those of the Roman law and of the modern Common Law. The contract is real, not consensual. Agreement on the thing to be sold and the price will not make a contract; there must be part performance on one side or the other, or at any rate 'something in earnest to bind the bargain' must be given; not as part payment, which is quite another thing, still less as a fictitious or symbolic payment, but as the price of the seller binding himself not to break off before performance[2]. There is not the least reason to suppose that the framers of the Statute of Frauds were Teutonic enthusiasts or had antiquarian intentions of any kind. What they intended, probably, was to make reasonable allowance for the existing habits of English buyers and

[1] See now 'The Statute of Frauds in its relation to the law of Scotland.' By Richard Brown. Glasgow, 1893.

[2] In accordance with this conception, the *seller only* was bound by giving of earnest down to the 13th century, and then only to the extent of repaying double the earnest-money. The buyer merely lost his earnest-money if he withdrew. Fleta, however, states a much more stringent custom of merchants imposing a prohibitory forfeiture on the defaulting seller.

sellers as they knew them. Those habits had doubtless remained, among country folk, practically unchanged for centuries. Almost a century later Blackstone could speak of shaking hands to bind the bargain as 'a custom which we still retain in many verbal contracts.' But Blackstone seems to compare this with giving earnest. It really belongs to yet another branch of the history of contract, to the history of troth-plight, *affidatio*, the religious or *quasi*-religious obligation which, after first supplementing the meagreness of secular law, and then, in the hands of the Church, becoming a formidable competitor, was finally merged in the temporal jurisdiction[1]. And this brings us round again to the very ancient marriage forms of which I spoke at the beginning of this address.

The contract of sale, as explained by Blackstone in the passage I have just referred to[2] may give us a little more food for reflection. 'As soon as the bargain is struck,' says Blackstone, 'the property of the goods is transferred to the vendee, and that of the price to the vendor.' And a few pages above we read that when *A* contracts with *B* to pay him £100 he 'thereby transfers a property in such sum to *B*; which property is however not in possession, but in action merely, and recoverable by suit at law.' Now Blackstone certainly knew as well as we do (and his own explanatory words would prove it if proof were needed) that *A*'s promise to *B* to pay *B* £100 cannot make *B* the owner of any specific money of *A*'s. What then does he mean? He is simply true to the old principles of all Germanic law, which still underlie the common law and its remedies in matters of property, however much our modern language and habits of thought may obscure them. Blackstone thought and spoke in the terms of a system to which the Roman *dominium* was foreign. The leading idea of Germanic property law is not ownership, but possession and rights to possess. Glanvill talks, it is true, of *proprietas* in connexion with the writ of right, but what he means is the right to be put in seisin. Strictly speaking, the common law has no form of action which can be compared to the Roman Vindication. The claims to property which it recognizes are founded on disturbance or denial of possession, and it arrived only by artificial methods at giving any remedy at all to an owner who had never had possession. It would require too much time and would take us too far into purely English technicalities to enter here on the proofs of this. But, whether the statement

[1] Mr. J. H. Round has an interesting note on *affidatio in manu* in the Appendix to his 'Geoffrey de Mandeville' (Note T).

[2] Comm. ii. 448.

seems novel or not, the conviction of its truth has grown upon me steadily for some years, and I have no doubt that the ancient Germanic notion of *gewere* or seisin—possession warranted by law—is still at the bottom of our common law doctrines. Refinements and expansions have come inevitably. When once you begin to protect and enforce a *right to possess* apart from actual possession you are tending towards *dominium*. We have refined in various ways on the right to possess—making it for certain purposes, by benignant fictions, equivalent to possession itself—until there remains about it little or no practical difference from ownership as conceived by a Romanized philosophy of law. Still the relation of the two orders of ideas is more like that of an hyperbola and its asymptote than that of two roads which, coming from different directions, ultimately coincide. I must give warning, in passing, that for my part I am not prepared to admit that our Germanic point of view is really less philosophical than the Roman.

You will hardly expect me to draw any definite conclusion from these desultory instances. Perhaps we have seen enough to show that tracing the pedigree of legal ideas is ticklish work. The most tempting resemblances of modern to ancient forms are often fallacious, and ideas which are really of great antiquity may, on the other hand, lie comfortably concealed in modern terminology. One way and another there is a great deal of ancient human nature about man, and it does not forsake him when he determines to be rational and a lawyer.

FREDERICK POLLOCK.

BALLADE OF JUDICIAL NOTICE.

'HELD, *that the Court will take judicial notice that rain falls, and after the lapse of some time, in the absence of evidence that none has fallen, will presume there has been rain.*'

(1845) *Fay* v. *Prentice*, 14 L.J.C.P. 298 (Head-note).

PER CURIAM:—

When juniors crave three minutes grace,
And mild excuses meekly make
For leaders in 'another place,'
Where cute Q.C.s the guineas rake;
The Court that makes Stuffgown to quake,
And absent advocates arraigns,
Per contra takes—and no mistake!—
Judicial notice that it rains!

We Judges doze within an ace
Of sleep; and, for appearance' sake,
Statute, and text-book, case on case,
Kind counsel quote: and so the stake
Is lost and won, that hearts may ache.
Then, glancing up at dusty panes,
We take—to show we're wide awake—
Judicial notice that it rains!

Clients may go with rueful face,
While lawyers share disputed cake;
Uncertainty still grows apace;
'Hard cases make bad law;'—so spake
The maxim old—yet who can slake
His thirst for Right?—Who thus complains
Forgets we take—tho' heavens down-break[1]—
Judicial notice that it rains!

ENVOI.

Suitors, whose aching backs do break
With costs, and penalties, and pains,
We take—at least you'll own—we take
Judicial notice that it rains!

SHOWELL ROGERS.

[1] 'We have fallen on times when there is much more of the "*ruat cœlum*" than the "*fiat justitia.*"'—*Thoughts upon the Present State and Prospects of Legal Discontent* (1859).

REVIEWS AND NOTICES.

[**Short notices do not necessarily exclude fuller review hereafter.**]

Les Transformations du Droit. Par G. TARDE. Paris: Felix Alcan. 1893. 8vo. 212 pp.

THIS is not a large book, and the author does not make profession of any large ambitions. But he has done two good things. In a generation addicted to specialism and technical criticism, M. Tarde has produced a work of learning not only readable but pleasant to read; and at a time when the ideas that were new to our fathers tend to harden into formulas attacked or defended, as the case may be, with obstinate insistence on the point of honour, he has brought a fresh and independent mind to bear on the real substance of the matter in question. His discussion of Evolution in Law, as the title might fairly be translated, is mainly in the nature of warning. The analogy of natural history, he contends, has been too confidently and too exclusively relied on by workers in the moral and political sciences. A safer analogy in some ways is that of the development of language, where, as in politics and law, the human element of preference and even deliberate choice makes itself felt. Deliberate imitation, in particular, has not in M. Tarde's opinion been sufficiently allowed for. We cannot refrain from quoting here, though the connexion is somewhat remote, a remark once made 'privily,' as they say in the Year Books, by a late leader of the Parliamentary Bar, well known to his friends as an accomplished scholar and wit. 'Historians,' he said, 'have never made proper allowance for the *deliberate lying of witnesses incapable of deception*.' This points epigrammatically at the same danger which M. Tarde combats, that of going about to explain the doings of mankind by the laws (or anomalies) of everything except human nature.

A positive point well made by M. Tarde is that the development of law is in extension no less than intension. It is not generally true that barbarous people have no sense of justice or no strict rules of conduct. Within the family, the clan, the caste (or in the East, Sir A. Lyall teaches us to add, the religious order in which other divisions are obliterated) there is no lack of either rules or enforcement. But the rules do not apply beyond the pale. Kinsmen or clansmen have their known rights, and the guest is sacred. The stranger has no part in the laws of the kindred or the city. There are no duties towards the alien, *hostis*. Almost in our own times heathens and heretics have been treated as having no part in the justice of Christian princes and rulers. To this day an Afghan may be ready to protect his guest at the cost of his life, and equally ready to waylay and rob him when he has passed out of the tribal borders. Under the Roman Government the *ius gentium*, made possible and necessary as a legal institution by the extension of the empire, received a new and exalted intension from the philosophic conception of the brotherhood of mankind. It is a little disappointing that M. Tarde has nothing to say of the edict of Caracalla. The transformation of Roman citizenship from the privilege of the City to the common right of the Empire was the formal sanction of the moral change which has been

noted. *Ius gentium* and *ius Quiritium* were fused in a larger whole; there was no longer one law for the citizen and another for the stranger. People who talk glibly of evolution in human institutions as a continual upward progress may be well advised to reflect that this work had all to be done over again in the Middle Ages. It is true that the Roman ideal was only dormant, and woke again to become a quickening spirit in the great lawyers and publicists of the Renascence and the following generations.

On the still vexed question of communal ownership or enjoyment in relation to private property, M. Tarde's reasoning fits in remarkably well, on more than one point, with M. Kovalevsky's inductive results. He is clearly in favour of the joint family being earlier than the village community, and he points out that the notion of individual rights of property must have grown up just in proportion as the subject-matter became capable of individual acquisition and enjoyment. He also points to the importance of remembering, in this connexion, that the unit of archaic law is not the person but the family. M. Tarde has some ingenious reflections on the theory of contractual obligation. If, as he maintains, the final reason of the law is something that may be called *équation des valeurs*, then is the Common Law, with its doctrine of Consideration, more philosophical than any other system. English readers at any rate have no cause to quarrel with this outcome. On the whole, however, we find that, while M. Tarde is never unprofitable, he is more profitable on historical than on speculative ground.

F. P.

Digest of Scottish Conveyancing Cases, 1874–1892. By A. M. Williamson. Edinburgh: William Green & Sons. 1892. 8vo. x and 389 pp. (*15s.*)

Works on Scotch Conveyancing are lamentably deficient in being kept up to date;—though perhaps not so deficient as would appear from some of the fossil editions on the shelves of our English law libraries. A well arranged and digested collection of Scotch conveyancing cases from the year 1874 to 1892, by an advocate of Aberdeen (*Anglice* a solicitor of that place), is a useful contribution to the literature of the subject. It would perhaps have been still more useful if the collection had been carried some ten years further back, so as to have brought up to date the information contained in the standard work of the late Professor Menzies, and to have included some of the earlier decisions under the Titles to Land Consolidation (Scotland) Act, 1868. The 20th section of that Act, which gave power to owners of Scotch land to dispose of it by will, introduced a new feature into modern Scotch conveyancing; and there are two cases of first-rate importance as to the construction and effect of an English will made under this power. These are the case of *Connel's trustees*, Court of Session 16 March 1872; and *Studd* v. *Cook*, House of Lords, 8 May 1883. The former is outside the period to which the present collection extends; and the latter appears, unaccountably, to have been omitted. Thus we look in vain for information from the present work upon points which, to an English conveyancer having to consider how to deal with Scotch land, are of the greatest importance.

R. C.

The Law of Copyright. Third Edition. By Walter Arthur Copinger. London: Stevens & Haynes. 1893. 8vo. l, cccxxxvi and 974 pp.

Seeing that it is twelve years since the last edition of this work was published, it is not surprising that there has been a considerable increase in

its size. The principal extension, as might be expected, is in the chapters dealing with International and Foreign Copyright, which now occupy more than three times the space they did in the second edition. The very full statement of the law in foreign countries will no doubt be found useful; and it certainly is instructive to compare the views taken of the rights of authors in different states throughout the world. France may safely be placed first in order of liberality. It would perhaps be invidious to specify the other extreme.

With regard to the United States the author notices the difficulty which has arisen owing to the Canadian authorities refusing to register American works or to recognise the United States Act of 1891, and the Proclamation thereunder, as equivalent to a treaty. Mr. Copinger points out that it would certainly be to the advantage of Canada to come to some arrangement in the matter, as many American authors would probably find it convenient to publish there rather than in this country for the purpose of securing English Copyright. This, under the Act of 1886, would of course be perfectly effectual; in what light English publishers would regard it is quite another matter. A further difficulty, which however does not appear to be noticed, is as to the reciprocal rights of American artists in this country. Under the Fine Art Copyright Act (25 & 26 Vict. c. 68) copyright is expressly confined to British subjects or persons resident within the dominions of the Crown; and, having regard to the assurances given to the United States on our behalf, a short Act abolishing this limitation appears to be urgently needed. Another point, originally raised by Messrs. Cutler, Smith and Weatherly in their work on Musical and Dramatic Copyright, is as to the position of the Colonies under the Act of 1886 and the Berne Convention. It is suggested that as the Colonies come into the Convention as 'part of the United Kingdom' therefore the United Kingdom must be considered the 'country of origin' of Colonial works, and that the formalities prescribed by its legislation must be complied with in order that such works may enjoy the benefits of the Convention. The suggestion is at first sight plausible, but we agree with Mr. Copinger that it is contrary to the spirit both of the Convention and the Act. Perhaps, however, too much reliance should not be placed on this argument after the decision in *Fishburn* v. *Hollingshead* ('91, 2 Ch. 371), as to the necessity for registration of foreign works of art in England notwithstanding the obvious intention of the Act and the Convention. It is to be hoped that this decision will soon either be reversed or rendered nugatory by legislation.

The other parts of the work do not call for special remark, but so far as we have been able to check it the book has been carefully brought up to date, though it is not entirely free from inaccuracies which should have been avoided. For instance, after referring to *Routledge* v. *Low* (L. R. 3 H. L. 100) the author states that 'the law now is' that a work first published in a colony has not copyright in the United Kingdom, whereas a few pages on we find that this state of things has been altered by the Act of 1886. We are glad to see that especial attention has been paid to the Index, and that its importance is recognised in the Preface. Altogether we may safely prophesy that 'Copinger' will maintain its position as the leading text-book on Copyright in all its branches. The only suggestion we have to make is that in any subsequent edition space might perhaps be saved by omitting the chapter on Copyright in Designs. This subject is really quite distinct from Copyright in works of Literature and Art, and is more conveniently treated of in connection with Patent and Trade Marks.

Woodfall's Law of Landlord and Tenant, edited by J. M. Lely. Fifteenth Edition. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. 1893. La. 8vo. lxxx and 1118 pp. (38*s.*)

The size of Woodfall's Landlord and Tenant makes the speed at which the successive editions appear a matter of congratulation to Mr. Lely, the experienced editor of the present edition, as well as of its four predecessors. The issue of five editions in sixteen years, the last of them containing more than eleven hundred pages, is an indisputable testimony to the practical utility of this Nestor among text-books. Under these circumstances it is vain to complain of any want of arrangement, as re-arrangement on any satisfactory scale would mean complete re-writing. At the same time the insertion of new matter in successive editions might be more satisfactorily arranged than it is; the subject of Bankruptcy, for example, might well be treated of under other aspects than as a method of assignment, and an incident of the Conveyancing Acts of 1881 and 1892. We could mention other similar instances, but the defects of a sound plan of arrangement are fairly well met by the merits of the index. It is interesting to observe (on page 11) that the editor continues to disapprove of the decision in *Walsh* v. *Lonsdale*, an opinion which he is quite entitled to express, though we could wish his view of the grounds of the decision of the late Master of the Rolls was more fully expressed. We regret to observe a few old friends such as a certain mysterious *Buckley* v. *Porter* on page 307, no doubt a near but illegitimate relation to *Buckley* v. *Pirk* on p. 309; there is also a misprint of 'or' for 'any' in a quotation from 11 Geo. II. c. 19, s. 21 on p. 557, and some reference to *Lyons* v. *Elliott*, 1 Q. B. D. 210 would not be out of place here, though it is referred to elsewhere. We are slightly surprised to find no reference to *Green* v. *Marsh*, '92, 2 Q. B. 330 either in the table or the text, but then there is no reference to *In re Willis* 21 Q. B. D. 384 either. No reference to 53 Vict. c. 5 on p. 50 is given in the index to statutes, and the excellent plan of abbreviating statutes, with words quoted verbatim put in inverted commas, has not had fair play with 53 & 54 Vict. c. 70, s. 74 on p. 414. Whatever may be the necessary structural defects of an almost centenarian text-book, such blots as these should be avoided. Mr. Lely appends a list of all his competitors in the same branch of literature, a course which is convenient to the reader, and which, as far as it goes, justifies the position which Mr. Lely would no doubt claim for his work.

The Companies Acts, 1862–1890, *and other Statutes*. By V. de S. Fowke. London: Jordan & Sons. Sm. 8vo. 403 pp. (5*s.*)

A Handy Book of Joint Stock Companies. Sixteenth Edition. By W. Jordan and F. Gore Browne. London: Jordan & Sons. Sm. 8vo. xx and 316 pp. (3*s.* 6*d.*)

Everybody now gets mixed up one way or another with trading companies, and so long as the connexion is confined to receiving satisfactory dividends remains contentedly quiescent; but it more often happens that dividends are highly unsatisfactory, and when this is the case, or when a person finds himself settled on the list of contributories, or unable to get paid his debt, perhaps defendant to an action for deceit as a delinquent director or fraudulent promoter, the situation at once creates a lively interest in the company's affairs and in the law relating thereto. These books, which form companion volumes, are the response to this grow-

ing interest. Mr. Fowke (realizing Lord Westbury's wish that there were no cases) gives us the Companies' Acts in their unsophisticated simplicity; while Messrs. Jordan and Gore Browne supply a useful exposition of the principles and cases. The fact that this latter volume is in its sixteenth edition is the best testimony to its usefulness. Together they furnish all that the ordinary mind can hope to assimilate of company law.

A Concise Treatise on Powers. Second Edition. By GEORGE FARWELL, assisted by W. R. SHELDON. London: Stevens & Sons, Lim. 1893. La. 8vo. xl and 708 pp. (25*s.*)

EIGHTEEN years have wrought a wondrous difference in the corpulence of the familiar 'Farwell on Powers.' Its bulk has swollen from 559 to 708 pages, and the pages are larger. If, as we believe, the acme which a legal text-book can attain is reached by the book which, carefully thought out and written at first, is afterwards amended and expanded under the author's eye during a long series of years, then Mr. Farwell has thoroughly satisfied the conditions precedent to success. His book was stamped with the approval of the profession many years ago. It is a much better one now. One exception we must make. We never liked, and we do not like now, the way in which the well known rule in *Topham* v. *Duke of Portland* is stated. It comes to this, 'Appointments cannot be severed, the good from the bad, except when they can,' which does not carry the student much farther. Nor is it very much assistance to quote a case in the same connexion, as follows:—'but see *Re Perkins*, 41 W. R. 170, *sed qu.*' This is cold comfort of the sample which a certain Mr. Smith had at Mrs. Perkins' famous ball. However, where there is so much that is good and excellent, smaller matters need not be emphasised. Mr. Sheldon has done his work as coadjutor very well, thereby adding to the reputation which he won himself over the new edition of 'Dart.' And the lamented Mr. H. R. Webbe has done much for the important chapter on 'Creation of Powers.'

A Concise Treatise on the Law of Mortgage. By W. F. BEDDOES. London: Stevens & Sons, Lim. 1893. 8vo. xxxi and 230 pp. (10*s.*)

THIS work is stated in the preface to be 'an attempt to present in a concise form some portion of the stores of learning which are to be found in the standard works of Coote and Fisher.' 'It does not deal with that portion of the law of mortgage which relates to the subjects discussed in the Treatises on the Companies Acts and the Bills of Sale Acts.'

The author has not dealt with the history of the law, but has stated concisely the different questions that may arise, together with authorities.

The book will be found of use rather to the practitioner who has a general knowledge of the law and only wants a collection of authorities than to one who wishes to learn the law.

No one will expect to find much that is new in a work of this nature, but we may perhaps point out that in Chapter IX the author gives some explanations as to mortgages of building societies, which are not, so far as we remember, to be found in any elementary book, and that in Chapter XII the rules as to mortgagees' costs are explained very clearly.

We have also received:—

Altes und Neues zur Lehre vom Urheberrecht. Von Dr. ALBERT OSTERRIETH. Leipzig: Hirschfeld, 1892. 8vo. 116 pp.—The first part of this book contains a historical sketch, the second a logical analysis of the general law of copyright. Those paragraphs of the first half which deal with England are not entirely satisfactory, the principal fault being the omission of any reference to the distinction between the author's common law right as subsisting in modern law and copyright in the strict sense; dramatic copyright is discussed in two inaccurate lines in the text and a short inaccurate footnote, and musical and artistic copyright are not mentioned. The practical suggestions following the analytical part are, as the author admits, not likely to be carried out for the present. He wishes copyright to be perpetual and literary piracy to be punished as larceny. The book is written in a very readable style, and contains a large amount of information as well as some interesting speculations. E. S.

Hayes and Jarman's concise Forms of Wills. Tenth Edition. By W. B MEGONE. London: Sweet & Maxwell, Limited. 1893. 8vo. lxvi and 582 pp. (*21s.*)—This new edition has been well done. The book has been thoroughly brought up to date, and the notes throughout appear to be useful and accurate. Much fresh and necessary matter (such as the 'Trustee Investment Act, 1889,' and the 'Mortmain and Charitable Uses Act, 1891,' with notes on the same) has been introduced; whilst to make room for it a considerable amount of the former and, by now, more unnecessary contents (notably, the somewhat lengthy note on 'dower') has with advantage been omitted. In the result, the book is shorter and cheaper than it was before, and forms a concise and useful collection of precedents, and of information as to the law affecting testamentary dispositions. To refer more particularly to the precedents, which are, otherwise, well chosen and particularly useful as regards bequests of businesses and as affecting traders generally, we might suggest that some one or more of them should deal with property situate abroad. There is, so far as we can see, no form dealing expressly with the case of a testator who wishes to dispose of English and foreign property as well. A word must be added in praise of the index, which is admirably arranged.

Marriages, Regular and Irregular, with leading cases. By an Advocate. Glasgow: W. Hodge & Co. 1893. 8vo. vi and 187 pp. (*2s. 6d.*)—This charming little monograph on the Marriage Law of Scotland is not intended for the practitioner, but the English lawyer may consult it with advantage. We have seldom seen a better book to place into the hands of students. The account of the essentials of a valid marriage, p. 12, is remarkably clear. A perusal of the discussion of irregular marriages will remove many misconceptions prevailing in England on the subject. As an example of an invalid irregular marriage he discusses the alleged marriage between Arnold and Anne in Mr. Wilkie Collins' 'Man and Wife,' and shows that it was not a marriage as there was no consent. The historical discussion of divorce is full of interest. The author states most clearly that according to the orthodox Catholic doctrine marriage is indissoluble though entered into without the rites of the Church, and discusses very shortly the existing law of divorce in the principal European States.

An Introduction to English Economic History and Theory. By W. J. ASHLEY. Part II. The end of the Middle Ages. London: Longmans, Green & Co. 1893. 8vo. xi and 501 pp. (*10s. 6d.*)—Chapter IV on 'The

Agrarian Revolution' deals to some extent with the history of villein tenure. Mr. Ashley's chief legal point has already been published in America and considered by Mr. F. W. Maitland in this REVIEW (vii. 174). Mr. Ashley seems not to have seen or not to have regarded Mr. Maitland's observations. Chapter VI on 'The Canonist Doctrine' (of usury and commercial profits) involves the question how far the canon law was received in England: on which Mr. Ashley (see his note at p. 472) deliberately differs with the Bishop of Oxford. He cites that eminent and happily quite living scholar, in German fashion, as 'Stubbs,' without addition of any sort. Our English usage, besides being more courteous, has the advantage of making a clear distinction between living and deceased authors.

The Jews of Angevin England: documents and records from Latin and Hebrew sources, printed and MS., for the first time collected and translated. By JOSEPH JACOBS. London: Nutt. 1893. Small 8vo. xxix and 425 pp. —A great deal of work and learning has gone into a small space in this book. It is addressed to students of history rather than of law, but it will be a necessary companion for all future writers who are concerned with the position of the Jews in England, before the law and otherwise, between the Norman Conquest and the thirteenth century. The relations between Jews and Christians in England appear to have been quite friendly before the last decade of the twelfth century; the Jews were cultivated people and spoke French. The change in popular feeling, which ultimately led to the expulsion of the Jews, was intimately connected with the crusading movement.

The American Corporation Legal Manual. A Compilation of the essential features of the Statutory Law regulating the Formation, Management and Dissolution of General Business and Insurance Corporations, &c. Vol. I. (to January 1, 1893). Edited by CHARLES L. BORGMEYER. Plainfield, New Jersey: Honeyman & Co. 1893. La. 8vo. x and 689 pp.—The Preface to this work, which it is intended to publish annually, says that 'the aim has been to place before the legal profession of this and other countries a concise synopsis of the laws regulating the formation, organization, management and dissolution of the principal kinds of business corporations authorized to be organized under the laws of the various States and Territories of the United States, and incidentally to furnish similar information with regard to the other States and countries of North, Central and South America. . . . . Careful Synopses of the Patent, Trade-Mark and Copyright Laws of the United States and of all foreign countries are also given.'

The Secretary's Manual on the Law and Practice of Joint Stock Companies, with Forms and Precedents. By JAMES FITZPATRICK and V. DE S. FOWKE. Second Edition. London: Jordan & Sons. 1893. 8vo. xv and 272 pp. (5*s.* net.)—The Preface states that 'the matter comprised in this edition is considerably increased; in particular the chapters on Books and Winding Up have been largely added to . . . . For the guidance of Secretaries, many additional forms and specimens of notices and resolutions have been given.'

A Digest of the Law of Evidence. By Sir JAMES FITZJAMES STEPHEN, Bart. London: Macmillan & Co. 1893. 8vo. xliv and 228 pp. (6*s.*)—In the Preface to this edition Sir James Stephen is again able to say that 'the law has hardly been altered at all since the book was first published.' The necessary alterations in this edition are limited to the addition of references to the cases decided—apparently very few in number—and statutes passed since the publication of the last edition.

Histoire des tribunaux de l'inquisition en France. Par L. TANON. Paris: L. Larose & Forcel. 1893. 8vo. 567 pp.—A book full of curious learning. The author attributes to the Inquisition a considerable share in forming the general criminal procedure of Europe, with the exception of England. It is certainly remarkable that Great Britain, the only country where a Germanic type of procedure has persisted in criminal matters, is also the only one where the Holy Office has never gained any footing. We complete M. Tanon's thesis by saying Great Britain, for the Romanism of Scots law is now known to be late and superficial.

A Manual of Roman Law. By DANIEL CHAMIER. London: Swan, Sonnenschein & Co. 1893. 8vo. xii and 233 pp.—If this book suffices for the requirements of the Bar Examination in Roman law, the standard must be even lower than we supposed it to be. We find in the 224 pages just three direct references to the Corpus Juris. Our own opinion is that compulsory Roman law does more harm than good.

Histoire du droit civil français. Par PAUL VIOLLET. Paris: L. Larose & Forcel. 1893. 8vo. xii and 942 pp. (12 fr.)—This is an enlarged and revised edition of the work formerly entitled *Précis de l'histoire du Droit français.* The ground seems to be completely covered, and very full references are given to both historical and dogmatic authorities.

An Outline of Legal Philosophy. By W. A. WATT. Edinburgh: T. & T. Clark. 1893. 8vo. x and 184 pp.—The Preface says that this book 'is an attempt to state shortly and simply some of the main principles which underlie the facts of law . . . . The standpoint is, approximately, Hegelian.'

The Old English Manor: A Study in English Economic History. By C. M. ANDREWS. Baltimore: Johns Hopkins Press. London and New York: Macmillan & Co. 1892. xi and 291 pp. (6*s.*)—The American edition of this book—with which this issue is identical—was fully noticed in L. Q. R. viii. 339.

The Revised Reports. Edited by Sir FREDERICK POLLOCK, assisted by R. CAMPBELL and O. A. SAUNDERS. Vol. IX. 1806–1808 (1 & 2 Sch. & Lef.; 13 & 14 Vesey; 8 & 9 East; 2 Bos. & P. (N. R.); 1 Taunt.; 6 Espinasse). London: Sweet & Maxwell, Lim. Boston: Little, Brown & Co. 1893. La. 8vo. xvi and 834 pp. (25*s.*)

Archbold's Pleading and Evidence in Criminal Cases. By Sir JOHN JERVIS, late Lord Chief Justice of the Common Pleas. The Twenty-first Edition, including *The Practice in Criminal Cases by Indictment,* by WILLIAM BRUCE, Stipendiary Magistrate for Leeds. London: Sweet & Maxwell, Lim.: Stevens & Sons, Lim. 1893. 8vo. xciii and 1219 pp. (31*s.* 6*d.*)—Review will follow.

A Treatise on the Law of Torts or Wrongs and their Remedies. By C. G. ADDISON. Seventh Edition, by HORACE SMITH and A. P. PERCEVAL KEEP. London: Stevens & Sons, Lim. 1893. La. 8vo. lxxxix and 893 pp. (38*s.*)—Review will follow.

A Manual of the Law specially affecting Catholics. By W. S. LILLY and J. E. P. WALLIS. London: W. Clowes & Sons, Lim. 1893. 8vo. xvi and 266 pp. (12*s.* net.)

The Railway Rates and the Carriage of Merchandise by Railway. By H. R. DARLINGTON. London: Stevens & Sons, Lim. 1893. 8vo. xxxvi and 581 pp. (25*s.*)

Commentaries on the Law of Public Corporations, including Municipal Corporations. By CHARLES FISK BEACH, jr. Two vols. Indianapolis: The Bowen-Merrill Co. 1893. La. 8vo. cclxiii, xxiv and 1692 pp.—Review will follow.

The Law of Corporations and Companies. A Treatise on the doctrine of Ultra Vires, &c. By SEWARD BRICE, Q.C. Third Edition. London: Stevens & Haynes. 1893. La. 8vo. xcv and 893 pp.—Review will follow.

Dictionary of Political Economy. Edited by R. H. INGLIS PALGRAVE. Part V. De Cardenas—Drawing. London: Macmillan & Co. 1893. 8vo. 513–640 pp. (3*s.* 6*d.* net.)

The Student's Guide to Prideaux's Conveyancing. By JOHN INDERMAUR. Third Edition. London: Geo. Barber. 1893. 8vo. xii and 129 pp. (5*s.* 6*d.*)

A Compendium of the Law of Torts. By HUGH FRASER. Second Edition. London: Reeves & Turner. 1893. Sm. 8vo. xxiv and 192 pp.

John Inglis, Lord Justice-General of Scotland. A Memoir. By JAMES C. WATT. Edinburgh: W. Green & Sons. 1893. La. 8vo. xii and 507 pp.

Louage des services. By CHARLES SAINCTELETTE. Brussels: Bruylant-Christophe et Cie. 1893. 8vo. 48 pp.

Hints on Advocacy. By RICHARD HARRIS, Q.C. Tenth Edition. London: Stevens & Sons, Lim. 1893. 8vo. xv and 356 pp. (7*s.* 6*d.*)

The Science of International Law. By T. A. WALKER. London: C. J. Clay & Sons. 1893. 8vo. xvi and 544 pp.—Review will follow.

The Law of Scotland affecting Trustees. By A. J. P. MENZIES. Vol. I. Edinburgh: W. Green & Sons. 1893. 8vo. xlii and 338 pp. (16*s.*)

The Burgh Police (Scotland) Act, 1892. Annotated by J. CAMPBELL IRONS. Edinburgh: W. Green & Sons. 1893. 8vo. xxxvi and 943 pp.

History of Federal Government in Greece and Italy. By EDWARD A. FREEMAN. Edited by J. B. BURY. Second Edition. London: Macmillan & Co. 1893. 8vo. xlviii and 692 pp.

The American Commonwealth. By JAMES BRYCE, M.P. Vol. I. *The National Government—The State Government.* Third Edition, completely revised throughout. London: Macmillan & Co. 1893. 8vo. xvi and 724 pp. (12*s.* 6*d.*)

The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.
